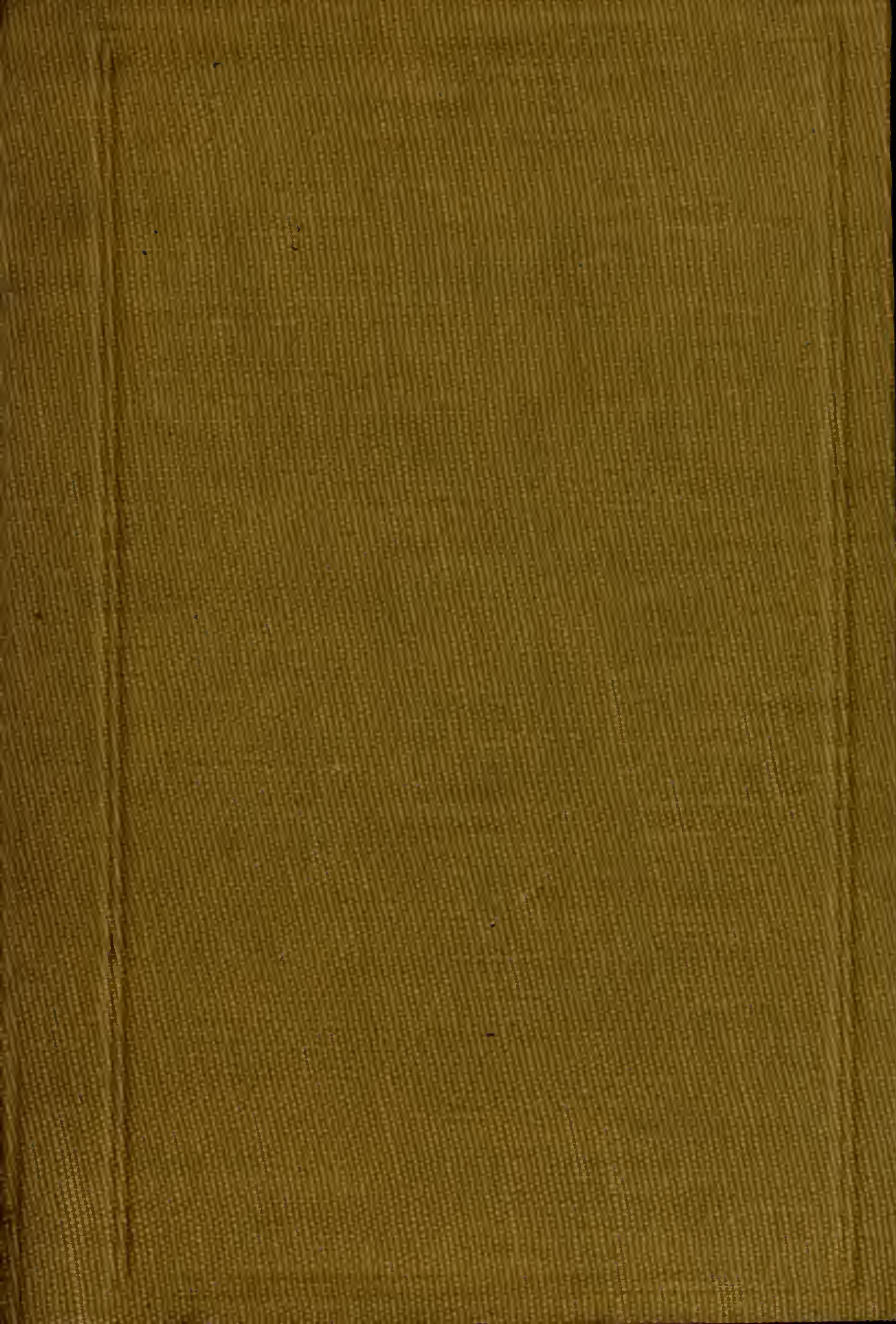

Form No. 7

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EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

No. 3953

1334 UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

(IN THREE VOLUMES.)

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

TACOMA MILLWORK SUPPLY COMPANY, a Partnership Consisting of ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A. DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN DAVIS,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS & COMPANY, a Corporation, and FAR WEST CLAY COMPANY, a Corporation,

Appellants,

vs.

ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, et al.,

Appellees.

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

BEN OLSON COMPANY, a Corporation,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN-AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

VOLUME III.

(Pages 865 to 1329, Inclusive.)

Upon Appeals from the United States District Court for the Western District of Washington, Southern Division.

FILED
JAN 30 1923
F. D. MONCKTON
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Appellees.

McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS & COMPANY, a Corporation, and FAR WEST CLAY COMPANY, a Corporation,

Appellants,

vs.

ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, et al.,

Appellees.

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

BEN OLSON COMPANY, a Corporation,

Appellant,

vs.

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Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

VOLUME III.

(Pages 865 to 1329, Inclusive.)

Upon Appeals from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Exhibit No. 137.

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation,
Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation.

NOTICE OF CLAIM OF LIEN.

NOTICE IS HEREBY GIVEN that the Washington Brick, Lime & Sewer Pipe Company, a corporation organized under the laws of the State of Washington, with its principal place of business at Spokane has and claims a lien upon certain real property described as:

> Lots Ten (10), Eleven (11) and Twelve (12), in Block One Thousand Three (1003), as shown and designated on the map and plat of New Tacoma, as filed in the Office of the Auditor of Pierce County, Washington,

for materials furnished to Scandinavian-American Building Company, a corporation organized under the laws of the State of Washington, with its principal place of business at Tacoma, pursuant to a written *written* agreement between said claimant and said Scandinavian-American Building Company, a corporation, as owner, dated February 28th, 1920, whereby said Claimant agreed to furnish all the terra cotta for a building to be erected upon said real property herein described, according to plans and specifications prepared by

the architect of said Owner, and according to further drawings and explanations to be furnished by the owner, necessary to detail and illustrate the work to be made, for which the owner agreed to pay the sum of one hundred nine thousand ($109,-000.00) dollars.

That pursuant to said contract, said Claimant commenced to deliver said materials to be used upon and in the construction of the building on said real estate, on September 25th, 1920, and ceased to deliver the same on or about January 13th, 1921.

That the owner or reputed owner of said real estate is Scandinavian-American Building Company, a corporation.

That there is now due and owing the said Washington Brick, Lime & Sewer Pipe Company, a corporation, claimant, from said Scandinavian-American Building Company, a corporation, owner, the sum of eighty-nine thousand ($89,000.00) dollars, with interest, over and above all just credits and offsets, for which said sum said claimant has and claims a lien upon said real estate.

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation.
By A. B. FOSSEEN,
Its President.

State of Washington,
County of Spokane,—ss.

A. B. Fosseen, being first duly sworn, deposes and upon his oath says: I am the President of the Washington Brick, Lime & Sewer Pipe Company,

a corporation, lien claimant above named, and make this affidavit for and on its behalf, being thereto duly authorized,

I have read the foregoing Notice of Claim of lien, know the contents thereof, and that the matter and things therein stated are true and said claim is just.

A. B. FOSSEEN.

Subscribed and sworn to before me this 28th day of January, 1921.

[Seal] CHARLES P. LUND,
Notary Public for the State of Washington, Residing at Spokane.

Recorded February 24, 1921, on page 26, Book 16, Records of Liens, Pierce County, Washington. [675]

The cause of Ben Olson Company, defendant, coming on to be heard upon its amended answer and counterclaim, and its reply to the answer and counterclaims of the Scandinavian-American Bank, J. P. Duke, Commissioner of Banking of the State of Washington and Forbes P. Haskell, Deputy Commissioner of Banking, and Receiver of the Scandinavian-American Building Company, thereupon:

Mr. FULTON, Attorney for Crane Company, said: The Olson case and my claim are identical in many respects, and I am willing that the Olson case may be heard first.

Testimony of Ben Olson, for Defendant, Ben Olson Company.

BEN OLSON, called on behalf of defendant Ben Olson Company, duly sworn, testified:
(By Mr. STILES.)

I am president of the Ben Olson Company; have been since. Its busines is plumbing and heating contracting. I know Drury, Larson and people connected with the Scandinavian-American Bank. We had the contract for furnishing material and labor on the new building. Were invited to submit bids early in January, 1920, for the plumbing and heating. Submitted bids. Paper produced is a copy of the bid submitted.

Admitted as Exhibit 251 (Stiles), as follows: [676]

Defendant's Exhibit No. 251.
(Stiles.)

Tacoma, Washington, Feb. 25, 1920.

Scandinavian-American Building Company,
Tacoma, Wash.

Dear Sirs:

We propose to furnish and install the Plumbing and Heating Equipments in the New Building to be erected for the Scandinavian-American Bank Building Company, Tacoma, Washington, for the sum of Ninety One Thousand ($91,000.00) Dollars.

This bid is based on the plans and specifications prepared by Mr. Frederick Webber, Architect and Engineer, modified as follows:

Using enameled iron lavatories Plate —— in offices and Plate —— in the public toilets as specified.

Also including two house pumps as per specification.

Also including one sump pump.

If Bond is desired cost of same will be added to our bid.

This Bid is based on present freight rates, and in event of a raise in rates same will be added to cost of all material not in transit.

Woil and Waste pipe to be assembled in pipe space above Bank. Size of waste and vent lines to be according to Tacoma Plumbing Ordinance.

Yours truly,

BEN OLSON COMPANY,

By ——————————.

WITNESS.—Our bid was accepted and we entered into a contract. Contract produced and admitted as Exhibit 252 (Stiles) as follows: [677]

Defendant's Exhibit No. 252.

(Stiles.)

THIS AGREEMENT, Made this 27th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Ben Olson Company, of Tacoma, Washington, hereinafter call the "Contractor," party of the second part.

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the

erection of a sixteen-story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11), and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T." of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Ben Olson Company of Tacoma, Washington, is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all plumbing and heating, as per estimate of February 21, 1920, hereto attached, under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, the sum of Ninety Thousand and No/100 ($90,000.00) Dollars, in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible,

yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly, to be paid in cash, of the estimated value of work delivered and also of work erected in place, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the completion and acceptance of work by the architect.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do *necessary* work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this Contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without no-

tice on the part of anyone, so as to complete the building at the earliest possible moment. [678]

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

Contractor to follow erection of steel work with all main lines for plumbing and heating and to buy, if necessary, piping in the open market in order to keep up with the steel work, so that the whole of said work can be completed within ten (10) months from the date of this contract.

It is also understood and agreed that the radiators from the old building are to belong to the Contractor.

ART XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract..

ART. XVI. And any and all work that may be

cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts.

ART. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Forty-five Thousand ($45,000.00) Dollars, conditioned for the true and faithful performance of this contract on the part of the Contractor.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of:

SCANDINAVIAN-AMERICAN BUILDING CO.

By CHARLES DRURY,
President.

J. SHELDON,
Its Secretary,

BEN OLSON COMPANY,
Contractor,

O. B. OLSON,
President.

(It was stipulated between Mr. Stiles and Mr. Oakley that although the defendants represented by Mr. Oakley had not filed an answer to the counterclaim of Ben Olson Company contained in its amended answer, nevertheless, it should be consid-

(Testimony of Ben Olson.)
ered that the allegations of the counterclaim were denied.)

WITNESS.—I saw Drury in reference to the waiver clause in the contract before signing it. I told Drury that this was an unusual [679] proceeding and before we could decide whether or not to enter this contract we should have to be shown how this building was going to be financed and we were going to get our money. He said they had arranged for a $600,000.00 mortgage for completion of the building, and I asked him: "How are you going to finance it up to that point?" He said the bank would carry the building project up to that point. He said: "In fact we are assured by the Bank Commissioner." I think he said, or the bank examiner, "that we can carry the whole thing if we want."

Later I saw Mr. Larson and had a long talk with him and he covered the same ground as Mr. Drury, that the money had all been arranged for, the mortgage had been secured, and the bank was carrying the project until the other funds were available. Upon these assurances we executed the contract and furnished materials and performed work. Without these assurances being given we would not have entered upon that contract at all, because I would not have considered it safe. I believed what those men told me. This contract provided for a completed construction of the building in about ten months and we immediately ordered all the material with instructions to procure as early delivery as possible. The bulk of material was or-

(Testimony of Ben Olson.)
dered from Crane Company. There was delay in the progress of the work. In the spring there was excavating and there was concrete work being done, and the foundations were being put in; prepared for the steel; and we ordered our materials and got delivery on pipe.

In the latter part of June we got delivery of a carload of pipe and had to clear away a space to store it on the building site. In July we presented an estimate or statement of what material was on hand. A paper shown me is Estimate No. 1, which included the first carload of pipe and some soil pipe, also which was delivered to the building. That bill amounted to $8,541.03, including a small amount of labor. That estimate was approved and payment made in accordance with the contract of 75%. The paper admitted [680] as Exhibit 253 (Stiles), as follows:

Defendant's Exhibit No. 253.
(Stiles.)

Tacoma, Washington, July 1, 1920.

Sold to:
SCANDINAVIAN-AMERICAN BANK BUILDING CO.

Estimate No. 1 for Contract Plumbing and Heating.

To 6″ soil pipe and fittings for cement alley	57.00
4″ galv. iron pipe fitting water supply on 11th Street side	40.00
Cartage on carload of pipe	48.00

Labor to date unloading pipe putting pipe
in rear 163.00
Carload of pipe as per attached invoice 8,233.03

8,541.03
Less 25% 2,135.26

Notations.
O. K.—S. WELLS.
Cr. Contracts. Ck. 346 $6,405,77
BEN OLSON COMPANY,
By M. O. HERBER,
Secty.
ORIGINAL.
FARRINGTON & BARNUM, INC.,
Auditors,
W. N. M.
25% is held back according to contract.
Entered D. B. 7/1—110. I. R. Page 18. [681]

Tacoma, Washington, July 1, 1920.
Sold to:
SCANDINAVIAN-AMERICAN BANK BUILDING CO.

1241–5	½	blk. Genuine W. I. Pipe	10.38..	$ 128.85
1842–10	1¼″	do	26.37..	485.93
1350–0	1½	do	31.53..	425.65
764–0	2½	do	70.50..	538.62
64–1	3½	do	111.16..	71.14
125–10	5	do	178.42..	224.20
134–3	6	do	231.36..	310.59

255–10	8	do	312.24..	798.81
2076–10	¾	Galv. genuine W. I. Pipe	15.89..	329.91
1463–1	1¼	do	30.25..	442.60
3325–6	1½	do	37.96..	1262.52
1182–8	2½	do	81.62..	965.27
148–2	3½	do	128.42..	190.15
768–7	6	do	267.87..	2058.79
				8,233.03

Notations.

FARRINGTON & BARNUM, INC.,
Auditors,
W. N. M.

BEN OLSON COMPANY,
By M. O. HERBER,
Secty.

O. K.—S. WELLS.

ORIGINAL. [682]

Tacoma, Washington, April 14, 1920.

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING CO.

To 5 ft. 4″ X. H. Pipe	8.00
1 ft. 4″ ¼ Bend	2.00
3# Lead	.45
1# Sheet lead	.20
1—2nd hand cellar drainer	10.00
1 tank 24x40x20 Sheet Iron	5.00
27 ft. ¾″ Galv.	2.25
15 ft. ¾″ Blk.	1.50

1—2d hand Globe Valve	1.00
1—2x1¼ tee Galv.	1.90
1—1¼x¾ Bushing	.20
5—¾″ Ells	1.00
1—¾″ Union	.40
4—¾″ Nips	.40
5—¾″ Straps	.20
Putting in Tank and cellar drain	10.05
	44.55

To taking care of drainage from old drain through Pacific Ave. retaining wall and lifting water to curb during building operations.

Notations.

Ck. 346.

FARRINGTON & BARNUM, INC.,
Auditors,
W. N. M.

BEN OLSON COMPANY,
By M. O. HERBER,
Secty.

O. K.—S. WELLS.
ORIGINAL.

Cr. AP.

Entered D. B. 7/1—1'10. I. R. Page 18. [683]

Later we presented another estimate No. 2, for the second carload of pipe and other material, including some labor, amounting to $7,972.83. That estimate was approved in the same manner as the other and a sum equal to 75% thereof was paid. Estimate No. 2 produced and admitted as Exhibit 255 (Stiles), as follows:

Defendant's Exhibit No. 255.
(Stiles.)

Tacoma, Washington, *S* Aug. 30, 1920.

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING CO.

Car Load Pipe—Estimate No. 2.

2769 ft.	7″	¾″	Blk @	13.20........	$ 365.59
2588	2″	1″	" Pipe	19.50........	504.70
1208	5″	2″		45.66........	551.76
832	7″	3″		92.94........	773.49
202	11	4		131.32........	266.46
56	1	10″		339.70........	191.51
2587	6	½″	Galv.	12.93........	334.56
1340	8	1″	"	23.53........	315.46
1455	4	2″	"	53.25........	721.71
2806	11	3		107.53........	3018.27
City Water meter and service charge....					450.00
Material and Labor making connection with storm in 11th St.................					42.00
100 ft. 4″ Blk. Pipe for Temp. Closet..					131.32
Soil Pipe and fittings " "					74.00
Water Pipe and fittings " "					15.00
Galv. iron tank and trough for temp. Closet					52.00
Labor unloading pipe and putting in temporary closets and putting in water service and storm sewer..............					166.00

		7972.83	
		53.56	
Notations		8026.39	
		8026.39	
ENTERED	Pay 75%	6019.70	
D. B. 9/3—153			
I. R. Page 24			Ck #530
	25%	$2006.60	9/25/20

O. K.—S. WELLS.

FARRINGTON & BARNUM, INC.,

Auditors,

W. N. M. [684]

Exhibit 256 is the check of the Scandinavian-American Building Company for $6,019.79, representing payment for seventy-five per cent of estimate No. 2. That exhibit reads as follows:

Defendant's Exhibit No. 256.

No. 530

SCANDINAVIAN-AMERICAN BUILDING CO.

Tacoma, Wash., Sept. 25, 1920.

Pay to the Order of BEN OLSON COMPANY $6,019.79. Six Thousand Nineteen and 79/100 Dollars.

SCANDINAVIAN-AMERICAN BUILDING CO.

By J. SHELDON,
Secty.-Treas.

To SCANDINAVIAN-AMERICAN BANK,
34–5 Tacoma, Wash.

(Reverse)

SCANDINAVIAN-AMERICAN BUILDING CO.

Tacoma, Wash., Sept. 25, 1920.

To BEN OLSON COMPANY,
Tacoma, Dr.

In full for invoices as follows:

Aug. 30th, Pipe, etc. $8,026.39

Distribution, Ben Olson Co., 75% 6,019.79

(Reverse)

Endorsed: Ben Olson Company. By M. O. Herber, Secty.

WITNESS.—We received no other sums of money in payment. We did get the radiators.

(Testimony of Ben Olson.)

To check up the items of the estimate, the Building Company, when the pipe was being delivered, sent their man down to Crane Company as it was unloaded and checked it and then we took it over to the building.

Again, on January 4th, 1921, we submitted another, Estimate No. 3, covering labor and material, amounting to $19,050.90. This estimate was approved by the superintendent, Mr. Wells, and sent to the office for payment, but it was not paid. The materials [685] and supplies representing the estimate were on hand and were checked up by the representative of the Building Company. They were at the building with the exception of some pumps that I could not store there. Estimate No. 3 admitted as Exhibit 257 (Stiles), as follows:

Defendant's Exhibit No. 257.
(Stiles.)

Tacoma, Washington, January 4, 1921.

Sold to:

SCANDINAVIAN-AMERICAN BUILDING CO.

Estimate No. 3.

Nov. 11,	2410′11 –4″ galv. pipe 151.35..	$ 3,648.95
Dec. 20,	Galvanized drainage fittings from B. O. stock..........	540.50
" 20th,	Galv. drainage fittings from Crane Co.........	2,445.45
	86″ Hulbert Fittings for closet drainage......	1,720.00
	Malleable Galv. fittings.......	1,864.74
	Galv. nipples (only)........	557.40

Cast iron steam fittings......	960.26
2 House pumps.............	1,134.00
1 Sump pump...............	474.00
17 sets hose and racks.......	1,542.00
Valves for branches.........	265.60
Steam radiator valves and main steam trap..........	2,460.00
1 –42x120 hot water gen. with steam coil........	650.00
Labor—Plumber, 44 days) Fitter, 7 ") Helper, 20 ")............	679.00
Superintendent of Plumbing and Heating........	100.00
	19,050.90
	19,050.90
Less 25%......	4,762.73
	$14,288.17

I have gone over this bill thoroughly and find materials listed either on the job or at Ben Olson Co. Shop.

O. K.—S. WELLS.

FARRINGTON & BARNUM, INC.,
Auditors.
W. N. M.

Notations:

Entered, D. B. 1/6–244. I. R. page 54. [686]

When the material in Estimate No. 3 came into our possession, the building was in the course of

(Testimony of Ben Olson.)

construction and there was steel scattered all over, and there was no room for storage of any great amount of material. Some of this material was detained at our shop or warehouse. I recall the pumps; two house pumps and one sump pump, seventeen sets of hose racks and some steam radiator valves. This material was certified by Mr. Wells and yet left at our warehouse because they did not have a proper storage place for it to protect it from the weather. It was material that would be ruined if it got wet. The building was all open.

Later still another small amount of material was brought and which we call Estimate No. 4, which, with the labor entered therein amounted to $2,131.23. This estimate was never presented, though they were furnished at the building. The materials amounted to $1,001.43 and the labor, $1,129.00. Estimate No. 4, admitted as Exhibit 258 (Stiles), as follows:

Defendant's Exhibit No. 258.

(Stiles.)

Tacoma, Washington, Jan. 15, 1921.

Sold to:

Scandinavian-American Building Co.

Estimate No. 4.

Hangers and Angle Iron..........	$11.50
Dynamo, threading, cutting Oil.....	5.50
Steel rods for Hangers West Steel..	31.50
Hose, couplings and arco sealit....	25.00
1—6″ X H Y..................	5.60

1 6 X H 1/16 Bend............		3.24
1 X X H 1/ 6 Bend............		4.02
30—5/16 X 6½ saddle clips)........		
30—5/16 X 8 " ").......		
30—7/16 X 11 " ").......		
30—7/16 X 14 " ").......		35.81
2—6″ Galv. Dry 45 Deg. ells.......		22.00
Hanger Irons....................		6.00
1 6x3 Bushing...................		2.38
1—6″ long galv. nip..............		3.20
2—4″ galv. Dr. 90 L. T..........	10.50	21.00
2—6″ galv. Dr. 45 Deg. ells.......	11.00	22.00
3—6″ " " 45	11.00	33.00
3—6″ "	11.00	33.00
4—6x4 Tees	22.00	88.00
Blacksmith Coal.........		6.00
1—6xH⅛ Bend..................		2.50

[687]

Estimate 4—Exhibit No. 258 (Continued).

6—4″ close Galv. Nip.	1.05		6.30	
1—6 x 4 bushing			2.38	
300 ft. ⅛ x 1 Band Iron)				
50 ft. ¼ x 1 Band Iron)				
100 ft. ⅜ x 2 " ")				
200 ft. 1 x ¼ stove bolts)			35.06	
16 ft. 3″ 4 Ply rubber belting			5.92	
Lumber, 6″ pipe and threads			28.50	
12—3″ plugs	.50		6.00	
128—4″ Plugs	.82		104.86	
25—1¼ Plugs	.10		2.50	
4—2″ Plugs	.15		.60	
12—2½	.35		4.20	
12—1½	.10		1.20	
4—6″ Plugs	2.40		9.60	
65—1½ Caps	.45	29.25		
25—¾ "	.20	5.00		
25—1″ "	.26	6.50		
		45.75		
	25%	10.19	30.56	
3 Pcs. 6″ galv. pipe 3½ ft.			10.60	
Cutting and threading			3.50	
1—3″ expansion joint)				
1—8″ " ")			150.00	
Ajax Electric Co. Wiring			78.31	
City of Tacoma meter installed			72.00	
4—6 x 4 Dr. Galv. tees		22.00	88.00	
			1,001.43	
Laborer 55 days @ 6.00		330.00		
Blacksmith 10 " @ 7.68		76.80		
Plumbers 57 " @ 9.00		513.00		
Fitter 10 " @ 9.00		90.00		
Superintendent		100.00		
Cartage		20.00	1,129.80	
			2,131.23	2,131.23

(Testimony of Ben Olson.)

WITNESS.—When this action was commenced, we applied for leave to withdraw certain of the materials to the amount of some $4,900.00. The items were taken from Estimates Nos. 3 and 4. The order of the Court gives the items and values as set down in those estimates. Copy of order admitted as Exhibit 259 (Stiles) as follows: [688]

Defendant's Exhibit No. 259.
(Stiles.)

In the United States District Court for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL CO.,

Plaintiff,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY,

Defendant.

BEN OLSON COMPANY,

Petitioner.

ORDER TO RECEIVER.

The above-entitled cause having come on to be heard upon the petition of the Ben Olson Company, a corporation, for the order of this Court directing Forbes P. Haskell, heretofore appointed by the Court its Receiver to take possession of and hold the property of the Scandinavian-American Building Company to allow the petitioner to take possession of and remove certain material, tools, and ma-

chinery claimed by petitioner to be its property, and to have been taken possession of by said Receiver, and to be withheld by him from the possession of petitioner; and the matter of said petition having been heard by the Court, Present: Messrs. Stiles 7 Latcham and J. F. Fitch, Attorneys for petitioner, and Messrs. Guy E. Kelly and Frank D. Oakley, Attorneys for the Receiver; and the Court being fully advised in the premises, finds that the petitioner, Ben Olson Company, is the owner and entitled to the possession of the following described materials and personal property in the possession of said Receiver, to wit:

Galvanized Drainage Fittings, from B. O. Stock	value	$540.50
Malleable Galvanized Fitings	"	1,864.74
Galvanized Nipples (only)	"	557.40
Cast Iron Sleeve Fittings	"	969.26
1—42x120 Hot Water Generator, with steam coil	"	650.00
16 ft. 3″ 4 Ply Rubber Belting	"	5.92
12—3″ Plugs	"	6.00
128—4″ Plugs	"	104.85
25—1¼″ " from Ben Olson's Stock	"	2.50
4—2″ Plugs	"	.60
12—11½″ Plugs	"	4.20
12— 1½″ "	"	1.20
4— 6″ "	"	9.60
65— 1½″ Caps	"	29.25
25— ¾″ "	"	5.00

(Testimony of Ben Olson.)

25— 1″	"	"	6.50
1— 3″	Expansion Joint).......		
1—8″	Expansion Joint).......	"	150.00

And the Court further finds that, for the reason that the vendor of the other materials claimed by petitioner in its petition, the Crane Company, which furnished the same, has filed a lien therefor against the building and property for which they were furnished, said Ben Olson Company, is not entitled to the possession of the same.

WHEREFORE, by reason of the premises and the law, IT IS ORDERED that the Receiver of this court, the said Forbes P. Haskell, is directed to allow said Ben Olson Company to take and remove the materials hereinabove scheduled.

EDWARD E. CUSHMAN,
Judge. [689]

Q. In fixing the value of these various items, what method would you follow? A. We used the same value as we used in estimating the job. Q. In estimating the job, did you estimate the expenses of the several items as they would come along? A. Yes. Q. And then you put in your bid for $91,000? A. Yes. Q. In making up those estimates and making these charges, and these two calculations, did you use these same values? A. Yes.

We continued to work on this material we had stored in the building up to the time of the close of the bank, when all work was suspended on January 15, 1921. Consequently we made up and filed a lien notice. (Court grants leave to de-

fendant to amend its lien notice by inserting the name "American" where omitted in the name of the bank and Building Company in the notice.) The lien notice admitted as Exhibit 260 (Stiles), as follows:

Defendant's Exhibit No. 260.
(Stiles.)

NOTICE OF LIEN CLAIM.
593796.

BEN OLSON COMPANY, a Corporation,
Claimant,

vs.

SCANDINAVIAN-AMERICAN BANK OF TACOMA and *SCANDINAVIAN BUILDING* COMPANY,
Respondents.

LIEN CLAIM NOTICE.

Notice is hereby given that on the 27th day of February, 1920, Ben Olson Company, a corporation organized and existing under the laws of the State of Washington, and having its place of business at Tacoma, Pierce County, was, at the request of the Scandinavian-American Bank of Tacoma, and the *Scandinavian Building* Company, employed to furnish and construct all the plumbing and heating plant for the building thereafter partially erected by said Bank and Building Company, upon Lots 10, 11 and 12, in Block 1003 of the Official plat of "New Tacoma W. T.," filed and recorded in the

Office of the Auditor of said Pierce County, February 3, 1875, of which property the owners and reputed owners were, and are, the said Scandinavian-American Bank of Tacoma, and Scandinavian-American Building Company.

That said Ben Olson Company commenced to furnish the materials for said plumbing and heating of said building, and to perform said labor of installing said materials on or about June 20, 1920, and continued to furnish said materials and perform said labor until January 15, 1921, when further construction of said building by said owners, and their refusal to further prosecute the same.

That the value of the materials so furnished by said Ben Olson Company was as follows, viz:

1. Materials actually furnished and deposited upon the premises for installation on $30,560.86. [690] 2. Materials procured by said Ben Olson Company to be manufactured specially for said building, according to the plans and specifications for the plumbing and heating therein, and delivered by the manufactu*res* to said Ben Olson Company in the City of Tacoma ready for use in said Building $21,293.42

Total materials 51,856.28

That the value of the labor performed in the installation of materials in said building was $2,237.80. That no part of the value of said materials and labor has been paid except the sum of $12,425.56, paid on account of materials deposited on the premises and the labor thereon; and

(Testimony of T. L. Stiles.)

That the said Ben Olson Company claims a lien upon the property above described, for the unpaid portion of the value of said materials and labor, in the sum of $41,666.52, less the amount of any lien which may be allowed to the Crane Company for materials furnished by it to said Ben Olson Company, for use in said building.

BEN OLSON COMPANY.
By O. B. OLSON,
President.

Verified and recorded April 14th, 1921.

We claim that the Scandinavian-American Bank is really the party liable to us for this debt.

Witness was temporarily withdrawn.

Testimony of T. L. Stiles, for Defendant, Ben Olson Company.

T. L. STILES, called on behalf of defendant, Ben Olson Company, duly sworn, testified:

As attorney for Ben Olson Company, on the 6th day of May, 1921, I carried and delivered to Mr. Haskell, Special Deputy Supervisor of Banking, a proof of claim on behalf of the company, with the statement attached to it that I hold in my hand,—copy of that statement attached I hold in my hand. On the following day I received from Mr. Haskell a refusal of the demand, whch I also hold in my hand.

I ask that these two papeis be admitted in evidence as exhibits. Papers admitted as Exhibit 261 (Stiles), as follows:

Defendant's Exhibit No. 261.

(Stiles.)

STATEMENT.

On the 27th day of February, 1920, the undersigned, Ben Olson Company, a corporation, entered into a written contract nominally, with the Scandinavian-American Building Company, by its President, Charles Drury, though as it appears, in fact, with the Scandinavian-American Bank of Tacoma, to furnish the materials and labor for the plumbing and heating of the building, then about to be commenced on Lots 10, 11, and 12, Block 1003, in the City of Tacoma, for the price [691] of $91,000.00.

The furnishing of materials and the performance of labor under said contract was commenced in July, 1920, by this Company, and continued from time to time, until work on the building was discontinued, January 15, 1921.

Within the time mentioned, this Company furnished for said work, certain materials and procured and had on hand other materials fashioned for and adapted for said work all of the value of $51,802.09
And labor of the value of 2,279.80

Total $54,081.89

To complete the contract, this Company would have had to provide and furnish additional materials of the value of	$16,691.64
Additional labor of the value of	11,196.70
	81,970.23
Wherefore its reasonable profit would have been	9,029.77
Contract price	$91,000.00

Therefore, the Scandinavian-American Bank of Tacoma, became indebted to this Company in the sum of the following items of the above:

Labor and material furnished	54,081.89
Reasonable profit on the Contract	9,029.77
	$63,111.66

But of the above sum there has been paid, the following, viz.:

July 1, 1920.	By Radiators	$1,000.00	
July 13, 1920.	By Cash	6,405.77	
Sept. 24, 1920.	By Cash	6,019.79	$13,425.56
	Balance Due		$49,686.10

Since furnishing the materials, and performing the labor above mentioned, this Company has learned that the Scandinavian-American Building Company was a corporation in name only, which was organized by the Scandinavian-American Bank of Tacoma, (which was the real subscriber for, and held and holds, all of the stock of the former) to

carry on the construction of a new bank building on the premises above described; and that, in fact, the Building Company was merely the agent of the Bank, in all that it did in that behalf.

For these reasons, this Company maintains that the above balance is due to it from the Scandinavian-American Bank; and therefore makes this claim.

Respectfully,

BEN OLSON COMPANY.

By O. B. OLSON,

President. [692]

PROOF OF CLAIM.

(By Corporation.)

Liquidating.

SCANDINAVIAN-AMERICAN BANK OF TACOMA.

Tacoma, Washington.

State of Washington,
County of Pierce,—ss.

Personally appeared before me the undersigned, a Notary Public in and for said County and state, O. B. Olson, who, being duly sworn, on his oath says that Ben Olson Company is a corporation organized and existing under the laws of the State of Washington, having its principal place of business at Tacoma, Pierce County therein; that he is the President of said corporation and makes this Proof of Claim for and in its behalf; that he is authorized so to do, and that the seal affixed hereto is the corporate seal of said corporation; that the

Scandinavian-American Bank of Tacoma, Tacoma, Washington, is justly indebted to said corporation in the sum of Forty-nine Thousand Six Hundred Eighty-six and—Dollars and ten (10) cents, upon the following, to wit:

For materials, labor and profit on Contract as set forth in the annexed statement which is made a part hereof $49,686.10

All of which is due and payable to said corporation alone, it having given no endorsement or assignment of the same or any part thereof, and affiant further says that he knows of no offset or other legitimate or equitable defense to said claim, or any part thereof, except that said corporation is indebted to said Scandinavian-American Bank of Tacoma on the following:

Offset Balance Due Bank on Promissory Note for $2,000.00 $518.37 581.37

Total $49,104.73

Name—BEN OLSON COMPANY.

O. B. OLSON,

President.

Address—1130 Commerce Street, Tacoma.

Subscribed and sworn to before me this 6th day of May, 1921.

[Seal] M. M. MILLER,

Notary Public, Residing at Tacoma.

(Testimony of Ben Olson.)

SCANDINAVIAN-AMERICAN BANK
of
TACOMA, WASHINGTON.

May 7, 1921.

Ben Olson Company,
1130 Commerce Street,
Tacoma, Washington.

Gentlemen:

I am in receipt of your proof of Claim for $49,-686.10. You are hereby notified that this proof of claim has been disallowed and disapproved by me.

Yours very truly,
F. P. HASKELL, Jr.,
Special Deputy Supervisor of Banking. [693]

Testimony of Ben Olson, for Ben Olson Company (Recalled).

BEN OLSON recalled.

(By Mr. STILES.)

There was considerable other material acquired by us which was not taken to the building. Material not covered by four estimates in evidence.

Mr. OAKLEY.—If the Court please, I wish to object to the question for the reason that he is not entitled to a lien for materials not delivered on the premises.

The COURT.—Well, if delivery, either actual or constructive, has been waived, another rule might apply and I cannot tell until I hear the testimony. I do not know whether it is lienable or not. The objection will be overruled.

(Testimony of Ben Olson.)

WITNESS.—There were a number of lavatories and wash-basins. In getting this stuff we placed orders with instructions to rush delivery. The orders were placed with Crane Company located in Tacoma. Crane Company is a jobber of plumbing supplies. These supplies ordered consisted of fixtures for the building. By fixtures I mean toilets, lavatories, urinals, and all other fixtures that are placed in the finished building. They were a special order, ordered especially for that job. They arrived early in January, I think most of them. They were not taken to the building. They were stored with Crane Company here in this city. I do not recall that we notified the Building Company or its representatives of the fact that these materials were here, but all work was suspended and of course we could not make delivery. The premises were in such condition that that kind of material could not have been safely delivered in the premises because it was exposed to the weather; no roof on it. (Papers shown to witnesses.) The paper shown me called Exhibit No. 5, is a list of part of the stuff I have been speaking about. That represents the closets; eighty-six closets of the value of $91.31 each, in all, $7,825. I think there is a credit [694] thereon of $1,720.00. That is the same $1,720.00 included in estimate No. 3. The closets were composed of two parts, one part used in roughing in, put in place when we placed the pipes into the building, that is, placed in the building at the time and is called the Hurlbut fitting. That is part of

(Testimony of Ben Olson.)

that order and charted in our estimate No. 3. This which we call Estimate No. 5, is the balance of the materials for the closets, part of which has already gone into the building, though not put in place. Estimate No. 5 admitted as Exhibit 262 (Stiles) as follows:

Defendant's Exhibit No. 262.

(Stiles.)

January 31, 1921.

Scandinavian-American Bank Building Co. Estimate No. 5.

To 86 closets complete Crane Co. Wall Outlet with B2341 connected flush valve, with B3438 Whalebonile Mahogany Finish Seat and Crane Hurlbut Drainage Fitting @ complete @ 91.31,	$7,852.66
Less Charge of Hurlbut fitting charged in Estimate No. 3, dated Jan. 4, 1921	1,720.00
	$6,132.66

NOTE: Above charge represents Balance of an uncompleted shipment, part of which was necessary to have on Building in roughing in.

Q. Now, could those things, Mr. Olson, be used to any advantage to any other building? A. No. The toilet bowls are no good without Hurlbut fittings, and could not be used anywhere without those fittings, and the valves were a special construction and were ordered for that particular job, made in a

(Testimony of Ben Olson.)
certain way. The valves for these toilets were ordered made.

We have still another list of items for the building which we call Estimate No. 6. They consist of thirty-three so*ild* porcelain urinals with air controlled flush valves; twenty-four enameled lavatories for toilet rooms; 238 enameled lavatories for offices; sixteen slop sinks, 8 by 12, with trimmings; and 375 vacuum [695] valves for the radiators. The vacuum valves for radiators were delivered sometime previous to this, but we were unable to store them in the building. They were stored at our store, value $2,250.00. We did not take them to the building because they required protection and there was no protection there, no cover for them. Other items on Estimate No. 6 were lavatories made especially for that building, fitted for Securo waste, which is not a standard equipment. The architect, in his specifications for this part of the work I think, specified Crane Company's goods. We ordered these goods according to specifications and I am sure that the lavatories were constructed specially. The urinals were solid porcelain. None of the goods in Estimates 5 and 6 were such as we would purchase for our establishment. They are only for buildings as they are needed; they are not carried by the jobbing houses. Estimate No. 6 admitted as Exhibit 263 (Stiles), as follows:

(Testimony of Ben Olson.)

Defendant's Exhibit No. 263.

(Stiles.)

Scandinavian-American Bank Building Company.
Estimate No. 6.

Merchandise ordered specially for the Building charged to us but not delivered to building:

33–18″ B4174 Solid Porcelain Urinals with outlet and inlet connections and air controlled flush valves @ 81.10	$ 2,676.30
24 Enameled Lavatories with Securo waste B440 for toilet-room complete with all trimmings, traps, supplies and self-closing Basin cocks @ 48.70	1,168.80
238 Enameled Lavatories B487 with Securo Waste for Offices complete with all trimmings as above @ 34.77	8,375.26
16 Slop sinks 18x22 B4984 Roll Rim slop sinks with Back, trimmings complete with wood rim guards @ 49.70	790.40
375 Vacuum valves for Radiation @ 6.00	2,250.00
	$15,160.76

Our company obligated itself for the payment of the cost of the items of these two Estimates No. 5 and 6. They are charged to us by Crane Company and we are required to pay the bill. The valves, [696] however, were not procured from Crane Company, but some other concern.

At the time we entered into our contract, I did not know the real relation between the Scandina-

(Testimony of Ben Olson.)

vian-American Bank and the Scandinavian-American Building Company. Did not know that the Scandinavian-American Building Company organized in November, 1919, had never had a meeting of its Board of Directors at all, up to the time we entered into our contract with it, except its organization meeting. I did not know that its Board of Directors did not pass any resolution whatever on any subject up to that time.

Cross-examination.

(By Mr. OAKLEY.)

I first talked with Mr. Drury in regard to this contract. I don't think I asked him if he actually had the money on hand, from the $600,000 mortgage. I did not mention to him that there were any mortgages on this building; did not know that there were mortgages of record in the Auditor's Office to the extent of $70,000. Mr. Drury told me that they were going to put the $600,000 mortgage on. I took it for granted that was going to be the mortgage on the property. I had no reason to think there were other mortgages there. I cannot say that I have ever had a parallel case to this, where a building was constructed and where it was known that a mortgage was being made. I knew that this $600,000 mortgage was to be put on these premises at the time I signed this contract but the mortgage was to cover the completion money, not the beginning, as I understood it. I never was a stockholder in the bank. I testified here in court in April in reference to getting possession of certain materials that

(Testimony of Ben Olson.)
I had delivered. I do not know that I could pick out from Estimates Nos. 1 and 2, how much of the materials in those estimates I took back. I think Mr. Herber could. I do not know that the water generator, valued $680.00 was made specially for this building. I do not think it was made specially for these toilets I have been [697] talking about. It was a standard make of tank, standard size, could be used any place. The toilet sets could be used any place where an architect would specify, cover exactly the same thing. They were not Crane Company's stock at all. You could not go and buy all of them without ordering it.

The reference in Exhibit 262, to B–2341, is to a special flush valve for a special setting. It is a catalog number, so is B–3458. Those are absolutely special; they do not carry them in stock. You will have to place a special order to get them. You cannot buy them in stock. Of the eighty-six closets, the Hurlbut fittings were delivered at the building. They were not taken away but are still there on the second floor. They are not built in. They were obtained from Crane Company. They fit with the closet, could not use them for anything else except that closet; they are part of the closet; are part of the combined stool and closet, fastened to it. I do not know of any office building in the City of Tacoma where these closets are used. One of them was delivered at the building, it was not put in place. The shipment arrived previous to January 5, 1921, was billed to us at that time; arrived here

(Testimony of Ben Olson.)

a short time previous to that. None of the material taken under the order of the Court, dated April 22, 1921, amounting to about $4,900, is covered by the lien of Crane Company. I could not say whether any of it was purchased from Crane Company or not, if it was, it was a long time ago. A great deal of it is some that we carried in stock ourselves. I do not think the hot water generator was covered by a lien. It was not bought from Crane Company.

We did not take practically all of the items of Estimate No. 3 away from the building. All of the materials mentioned in Estimate No. 4 was delivered at the building.

In the Crane Company catalog shown me, on page 15, there is a detailed drawing of the fitting; part of the closet, that is shown on page 14, is simply the method of installation. Catalog admitted, marked Exhibit 264 (Here insert). Not to be printed; to be [698] forwarded to Clerk of Circuit Court of Appeals.

(By Mr. METZGER.)

I am of the impression that the fixtures in this building are specified in the contract to be taken from Crane Company's catalog. I would not say that positively. Being shown specifications, I find that the Crane Company lavatories, closets, etc., were specified. The urinals mentioned in Estimate No. 6, Exhibit 263, described as B-4174, are as portrayed on page 467 of Crane Company's catalog. The next item on Exhibit 263 is for

(Testimony of Ben Olson.)

certain enameled lavatories described by the number B–440. They are not of Crane Company make. They were made by the Pacific people in this case. The specifications called for a Crane Idalia Victor lavatory but that was changed before the contract was entered into. We bought them from Crane Company but they were products of the Pacific Company, which manufactured all these goods. They were of the same type as Crane Company B–440 but fitted with a Securo waste; that is what made it special. The Securo waste is something like that indicated in the catalog but no other concern has one similar to this. This specification of the architect as to lavatories was changed. We bid in the first place on vitreous china lavatory and then we bid on enameled iron lavatories, as an alternative, which cost several thousand dollars less, and the architect decided on the enameled iron lavatory in order to reduce the cost. The contract price was changed some four or five thousand dollars. On page 39 of the specifications it says that the fixtures, under the heading "Plumbing Fixtures," are taken from the Crane Company catalog and circular No. 531–B. That applies to urinals, lavatories and all of these. Referring again to Exhibit 263, the lavatories B–47, is the same as is shown on page 93 of the catalog with the exception of this Securo waste. Crane Company includes the Securo waste only in special cases. It is not an ordinary stock waste; it is a larger waste than the ordinary waste and for

(Testimony of Ben Olson.)

that reason the patterns of the lavatories [699] had to be changed to fit it. They manufactured it but I could not say if they carry it in stock. The rolled rim sink, the same as shown on page 576 of the catalog, designated as B–4984; probably none of the materials covered by our estimates in evidence, is not described or included in the general plumbing catalog such as the Crane Company issues.

The carload of pipe included in Exhibit 253, was bought from Crane Company. All of this material for which we are making claim was furnished under the contract, Exhibit 242. We were to furnish it and install it in the building. We did not take any of that carload of pipe back.

The Hurlbut fittings taken in conjunction with the items intended to be covered by Estimate No. 5, Exhibit 262, constitute the complete closet. Those fittings are under part of the closet which is installed as the work of erection of the building goes along, leaving the top part and the feet to be put on after the building nears completion. They were over there in the building uninstalled. With these fittings and the other material which is in Crane Company's warehouse, we would have complete closets suitable for installation in any public building where they were specified. All of the material covered by Estimate No. 6, Exhibit 263, is in Crane Company's warehouse except the last item, 375 vacuum valves. The warehouse is at 12th and A Street, in this City. The

(Testimony of Ben Olson.)
valves were procured from C. A. Dunham & Company. They are manufacturers of steam supplies, representated here by Godfrey-Jones Company. I do not recall whether they were specially prepared or not, they were substituted by Mr. Drury for the originally specified valves. I do not know why. Those valves are now at our store, they could be used on any type of radiator but only where that particular system of heating is in use; I mean the vacuum system of steam heating. The things on Estimate No. 5, Exhibit 262, are at the Crane Company warehouse. The material covered by Estimate No. 4, Exhibit 258, was all delivered at the building; the [700] greater part of it was taken back. None of it was procured from Crane Company.

Of estimate No. 3, Exhibit 257, I cannot tell offhand what was delivered to the building, I recall the pumps, they were in our possession and they were purchased from Fairbanks, Morse Company. The second item came from our stock; the third from Crane Company. The fourth item from Crane Company, the fifth, sixth and seventh items from some other jobbing house, being ordinary stock carried by any jobbing house. The pumps were from Fairbanks, Morse Company, the hose racks from the United States Rubber Company on A Street, and these valves designated as valves for branches, were from our own stock. The hose and racks were never delivered. The specifications show the type of the fixtures, except where

(Testimony of Ben Olson.)
changes were made before the contract was entered into.

Redirect Examination.

(By Mr. STILES.)

Ben Olson Company is a corporation organized in the State of Washington, doing business in Tacoma. We had paid our last taxes to the State. If we had been allowed to go ahead with our contract we would have completed it according to the terms.

Referring to Exhibit 251, our proposition to the Company, in which we say that this bid is based upon the plans and specifications prepared by Mr. Webber, Architect and Engineer. That is the changed specifications. It was accepted with the understanding that it was to be used. It included two pumps as per specifications, and also one steam pump. There were other slight changes made from time to time in the specifications. One of the changes made was to the Dunham trap. A Warren and Webster trap had been specified. When Mr. Wells accepted the items contained in estimate No. 3, he knew that part of them were in our possession, at our warehouse.

Recross-examination.

(By Mr. METZGER.)

Mr. Wells O. K.'d the estimate and put it in line for payment. [710] He checked it all off, and that is what I base my statement on,—that he accepted those articles.

(Witness excused.)

Testimony of M. O. Herber, for Ben Olson Company.

M. O. HERBER, called by Ben Olson Company, sworn, testified as follows:

Direct Examination.

(By Mr. STILES.)

I reside in this city. I am secretary of Ben Olson Company; have been since 1904 with the exception of one year. I am acquainted with the transaction between Ben Olson Company and the Scandinavian-American Building Company. My connection with it was in formulating the original estimates and assisting Mr. Olson, and later on in looking after the details of the job. In addition to my secretaryship, I was purchasing agent and general or assistant manager when Mr. Olson was absent. I am accustomed to making up estimates and entering into arrangements of this kind, have been for a little over 20 years; have been connected with the plumbing business twenty-one years with the Ben Olson Company. I attended a general conversation at the Tacoma Hotel with Mr. Drury, Mr. Olson, G. Wallace Simpson and Architect Webster. That was some time previous to the signing of the contract; between the 1st and the 27th of February. I remember there was some talk of the plans of the finances. The statement was made that it was all financed, and there might be fifteen or twenty thousand at the end that might have to be taken care of. A statement was made by Mr. Drury that it was all

(Testimony of M. O. Herber.)
financed, and might be a question of $15,000 or $20,000 implicating, we might have to take a little bonds, but there was no deals made or reservations made. The building was to cost over a million dollars and there was to be a mortgage of $600,000. They said it was fully financed. There was no question about that payment. We were given the full assurance that it was and that our money would be forthcoming every month according to that 75% clause. I do not recall that anything was said [702] about the other $400,000 except the statement that it was fully financed and the bank would take care of it except the $20,000.00. They did not tell us that on or about February 10th, two or three weeks before our contract was entered into, the Scandinavian-American Bank and the Scandinavian-American Building Company had fixed up an arrangement by which there was to be a $750,000 mortgage, second mortgage, go on that property and that $350,000 was to be ahead of any contract. I never knew until lately here in this hearing that any such scheme as that had been arranged. After receiving the contract we were under the impression and had been given the idea that this building was going to be rushed; consequently it was up to us to hold our end up, and in order to do that it was necessary to place the orders, because it was practically all an unusual job and consequently special, and in fact the pipe itself was a special wrought iron instead of a steel pipe as is usually

(Testimony of M. O. Herber.)
used, and the fixtures all special in design and particularly as to the quantity of them; it was necessary to have all of these details carried out, and we immediately placed the order just as fast as we could assemble our estimating, in order to conform to the somewhat numerous changes that had been made; and placed the orders with the understanding, particularly with the understanding to rush the material through as fast as possible, and I remember particularly in regard to the closets, the manager of Crane Company and myself went over the details, stating that those closets would have to be manufactured special for the job, and consequently it was necessary to get the order in as early as possible in order that they would have the goods here when needed.

I am familiar with the various estimates that have been presented here. In addition to the estimates for material, some labor was performed, which is included in those estimates. That labor was actually performed.

WITNESS.—Handed estimate No. 1. Q. Now take Estimate No. 1 and [703] just give the Court briefly the actual condition of that estimate as presented in this claim, that is segregate the material and labor, and show how much there is of each.

WITNESS.—A. The total claim is $8,541.03. The labor item $163. The material furnished $8,358.03. On this estimate there was paid 75%. Q. Now take Estimate 2 the same way.

(Testimony of M. O. Herber.)

WITNESS.—A. Total estimate No. 2, $7,972.83. On which labor was $208, leaving merchandise only $7,764.83, on which estimate there was paid 75%, $6,019.75. Q. Take Estimate No. 3. A. (WITNESS.) Total $19,050.90; labor $779. Out of this estimate there was taken away items totalling $4,581.90, leaving at the building $7,814.40. There was over at our warehouse five items totalling $5,875.60. These four segregations make the total estimate. The $4,581.90 has been entirely deducted and is not included in this lien at all. The $779 of labor we claim at another place. $5,875.60 worth of items are at our warehouse and on the premises, $7,814.40 worth. Q. Now, Estimate No. 4. A. (WITNESS.) The total material charged is $1,001.43 out of which we took away $325.62 worth, leaving at the building $675.81 worth. Labor, $1,129.80. Q. Can you go over the estimates and recapitulate the amount of each claim and the total amount of the claim of Olson & Company on those four estimates. A. (WITNESS.) Estimate No. 1, material, $8,378.03, all at the building, and labor $163 actually performed, on which seventy-five per cent was paid.

Estimate No. 2, material only, $7,764.83, all at the building; labor $208, actually performed, upon which seventy-five per cent was paid.

Estimate No. 3, total $19,050.90, segregated as follows: Labor $779, actually performed, material left at the building, $7,814.40, and material taken

(Testimony of M. O. Herber.)

back and given credit for, taken out on the order, $4,581.90, held at our shed, $5,875.60, on which none has been paid. That is Estimate No. 3.

Estimate No. 4, total delivered at the building, $1,001.43, and we took back and gave full credit on Estimate No. 4, $325.62, [704] leaving $675.81 actually at the building; labor $1,129.80.

We have another item at the shop consisting of 375 vacuum valves which are in our Estimate 6 to follow; the amount of these valves is $2,250, this makes a total of $8,125.60 at our building.

Our estimate No. 5 is a balance of material only $6,132.66. Estimate No. 6 is for $12,910.75, from Crane Company. The other item for $2,250 for vacuum valves we have at our shop. I have included labor with Estimates 1, 2, 3 and 4, amounting to $2,279.80. Estimates 1, 2 and 3 were submitted to the Building Company. The items in Estimate 4, were actually furnished. Estimate 5 is the balance. That is really the balance on the toilets; there was a partial delivery made on the toilets at the building. The items represented by Estimates 5 and 6 are here ready to be delivered when accepted and that is the case with all of the material which we have in storage.

Q. Now, Mr. Herber, about this material on Estimate number 3, which is at your warehouse, just state to the Court how that material came to be in the warehouse. A. The understanding I had with Mr. Wells, they were to receive delivery of the material which had been received. It had

(Testimony of M. O. Herber.)

been expected that the building would be ready before the material got here. On account of the delay in the building, considerable of that material was assembled and we were anxious to deliver it at the building and find a place for it, and so we met with Mr. Sherman Wells, superintendent of the building and he told us to leave it at the shop, he would recognize them in our shop as delivered, and O. K. Estimate number 3 that contained those items. Q. And about the $2,250 worth of valves on Estimate number 6, how about them? A. They arrived just about the,—around the first of the year, and we did not have opportunity to include them in Estimate number 3 or 4, and consequently they were included as being ready for delivery. They would have been here earlier, had the building been ready, but we were able to get a little delay on that particular item, but they came in, expecting [705] to use them at the building. Q. How about the present time, are they in your warehouse? A. They are at the warehouse. Q. What was the reason for placing them in the warehouse? A. The principal reason is they were quite a valuable item and represented no small amount, took a small amount of storage, and at the time they came, they came shortly after the bank had failed, and we put them in the warehouse.

When we commenced our preparations under the contract, we got out orders for all the materials expected to be used, as far as we could anticipate.

(Testimony of M. O. Herber.)
Some of the material has never been received as we were able to cancel orders for goods that had not been actually sent. The large item that we were able to stop, consisting of radiation material, amounted to some $7,000. Q. Now, have you made an estimate of what it would have cost, what material would have been required in addition to what you have covered by your list of claims now, to complete your contract? A. Yes. Q. And how much would that be?

Mr. METZGER.—I object to that as immaterial, irrelevant and incompetent, and as not a proper lien charge.

The COURT.—You are trying to deduct,—

Mr. STILES.—I am not going to ask anything for it, but I am going to ask something at the end of this matter, for our reasonable profit on the contract, and to do that, I have to show what would have been required.

Mr. OAKLEY.—I want to make objection on the ground that it is an attempt to make a lien on an item that represents damages for the breach of this contract, which is not recoverable in this action.

The COURT.—I have some doubt about it, but I do not want to prejudge it. Objection overruled for the present.

Mr. OAKLEY.—Exception.

The COURT.—I will hear you in argument in that, along with the other reserved points."

(Testimony of M. O. Herber.)

WITNESS.—The balance of material necessary to finish the job would cost $16,691.64. [706] I arrived at these figures by scanning through all of our Estimate Books and material that was delivered on the job and the material we were able to cancel already ordered, and took off all those items; and that is what the total stands at. Labor necessary to finish the job would have cost $11,096.70 according to the original labor estimates. The amounts claimed under the lien and the amounts which it would take to complete the job, including labor and material, total $81,970.23, which would have been the cost of the job completed to Olson & Company. The contract was for $90,000 and we would have realized $8,029.77, which would have been our profit on the job.

Mr. STILES.—We are conceding by our complaints herein, that the Crane Company are entitled to a portion of this, and we only ask for the balance left after they get theirs.

The COURT.—Do you mean the balance of the sale price of the material?

Mr. STILES.—I am simply showing we are not denying Crane Company's claim.

Q. Now, something was said to-day about some of this stuff of Crane Company's having been purchased by catalog or being purchasable by catalog. What have you to say about that as to this particular lot of items?

A. The items particularly,—as far as the fact of a plate number making a fixture standard, it

(Testimony of M. O. Herber.)

is not our understanding whatsoever. There are any number of plate numbers and fixture numbers in the Crane Company catalogue, that are not kept in stock and manufactured. In fact there are some of the plate numbers that require particular plans giving details and so forth, before they can be built, even though in spite of the fact that there are plate numbers given and pictures in the catalogue.

Q. In other words, although this catalogue that was shown here this morning, has a large number of plates in it, are those [707] known to the trade as being kept in stock?

A. No, they are not kept in stock.

Q. Are they designated in any way in the catalogue, so that you can tell what are kept in stock and what are not?

A. Yes, sir, in certain cases they are, and often they are not. You have to get that information from the wholesale house.

Q. Now, what about these fixtures that were specified for this building as regards the catalogue?

A. The conversation was to expedite the placing of the order and getting the details fixed up, for the bowls particularly had to go through the kiln and be manufactured after the order was sent east, and furthermore in regard to the Hurlbut fittings that comes with these, it was necessary to work out several details, because there are 24 different patterns of Hurlbut fittings. In other words, there are 12, numbered from 1 to 12 right and 1 to 12 left, making

(Testimony of M. O. Herber.)

24 distinct Hurlbut fittings, so we had to have a number of plans as it was distinctly understood we could not return them or if there was any mistake made, there would be no chance of getting credit in case they were not used and a substitution was made.

The COURT.—No chance to get a credit, applies only to the fittings, is that right?

WITNESS.—Or to have an exchange, your Honor.

Q. Now, with these things on your hands,—

A. I beg pardon?

Q. With these basins, for instance, on your hands, what would they be worth to you in the trade?

A. I would not estimate them at over 25 per cent at the outside.

Q. How long would it take to dispose of them?

A. The large number of lavatories for that job, we would be considered very fortunate, and we would have to use extraordinary [708] diligence to dispose of them in ten years time.

The COURT.—Now, when you speak of basins and bowls and lavatories, are you all the time talking about the same thing? A. Yes.

Q. Now, what about these slop sinks?

A. The slop sinks are special on three counts; size, particularly, 18x22, is not the stock size that is carried in stock by the wholesale houses here. Each fixture had to be supplied with a wood rim-guard. That is never called for in standard work or usual customary work, and the third count is the

(Testimony of M. O. Herber.)
fact that the waste outlet goes through the wall instead of through the floor, making them particularly special.

Q. These shown in the book went through the floor?

A. The urinals are special because of the waste outlet particularly, that being what is known as a Dunham trap instead of a cast iron trap, usually used, and then the fact of the quantity, particularly in our establishment, makes them extremely special.

Q. What is that word, Dunham?

A. They use steel or wrought iron for the waste pipe instead of a cast iron one. Only large buildings like the Tacoma and the Scandinavian-American Bank Building, use that kind of construction.

Q. Have you tried to stop any of this material from Crane Company?

A. Yes, sir, we tried to make blanket cancellation of everything that was not here, and we were successful in being able to cancel the radiation and covering particularly, but the balance of the items we were not. They had already been manufactured. Although the lavatories should have been shipped some time previous, but had been delayed, we had been able to get delays on account of the construction of the building, for some time, but we did not expect the delay to take that long. The basins should have been here several months previous if they had taken their usual course. [709]

Q. Here is a list of items I will hand you and ask

(Testimony of M. O. Herber.)

you if that is a summary that gives the claim of Ben Olson Company as it is presented here?

A. Yes, it is.

Mr. STILES.—We offer this in evidence.

The COURT.—It will be admitted as a summary.

Said summary of the Olson claim was received in evidence and marked Exhibit 269, as follows:

Defendant's Exhibit No. 269.

(Stiles.)

RECAPITULATION OF CLAIM OF BEN OLSON COMPANY.

Estimate No. 1, Materials delivered ..	$ 8,378.03
" No. 2, " "	7,764.83
" No. 3, " "	7,814.40
" No. 4, " " ...	665.81
" No. 5, " " ...	6,132.66
" No. 6, " " ...	12,910.76
Materials in Shop (Ben Olson Co.,)	5,875.60
" " " (F. H. Godfrey)	2,250.00
Estimate No. I, Labor	1,163.00
" No. 2, "	208.00
" No. 3, "	779.00
" No. 4, "	1,129.80
	$54,081.89
By Payment a/c Estimate No.1, $6,405.77	
No. 2, 6,019.79	
	$12,425.56
Balance due for Materials and Labor ..	$ 41,656.33

(Testimony of M. O. Herber.)

Furnished Labor and Materials	$54,081.89
Estimated to Finish Materials	16,691.64
" " Labor	11,196.70
Total Cost	$ 81,970.23
Profit on Contract	8,029.77
Contract Price	$ 90,000.00
Due Plaintiff, Material and Labor	$ 41,656.33
Profit	8,029.77
	$ 49,686.10

Cross-examination.

(By Mr. OAKLEY.)

Q. Can you tell us the difference between the value of the material actually delivered to the building at the present time, and the amount which you have paid, which is 75% [710] of the invoices? A. The material actually at the building at the present time is $24,633.07. We have been paid $12,000 and odd dollars, I have not got the exact figures. Q. How much of that is covered by the lien claim of Crane Company, how much of those items is covered by that? A. Practically $20,000. We were to install this material but the $24,000 does not include the cost of installation, except labor already furnished. Our labor item is not covered in the $24,000; the labor is on top of that. If I took the labor it would be $27,000.

(Testimony of M. O. Herber.)

(By Mr. METZGER.)

To complete the purchase of material for the job besides Estimates 1, 2, 3, 4, 5 and 6, would take $16,691.64, and the additional labor would cost $11,196.70. Of the amount for material $7,984.11 is included in straight radiation material. That radiation material is what we cancelled. Of the additional labor item of $11,196.70, $5,857 would have gone to the cost of radiation installation. We placed or order with Crane Company in writing. I have here a quotation furnished by Crane Company for this job. The order follows the quotation in part; there were some changes on that so that our final order was modified. That is a copy of the order for the fixtures.

Mr. METZGER.—I would like to have this marked for identification, 270.

WITNESS.—That is the copy of the order which I placed. The first item, 86 closets complete, is the same as the closets itemized on Estimate 5, Exhibit 262, and the second item on identification 270 is the first item on our Estimate No. 6, 32 urinals. B-4174, the third item on identification 270, lavatories, corresponds with the second item on Exhibit 263. The fourth item on 270, 238 lavatories, corresponds with the third item on Exhibit 264 and the last item on 270 corresponds with the fourth item on Exhibit 263, 16 slop sinks.

Q. Now on this order you have designated each item simply by a catalogue number and size, have you not? [711]

(Testimony of M. O. Herber.)

A. Yes, this was at all times,—in other words, this was an abbreviated form for our convenience. The complete detailed descriptions would refer back to the specification again, but this is a true copy of the order which we placed and under which the items in Estimate 5 and 6, Exhibit 262 and 263 were furnished. The urinals were special by reason of the outlet connections and the quantity. The quantity was larger than Ben Olson Company carried in its stock here or ever carried. I would say that it was larger than Crane Company carried. Crane Company have a great many branch houses, I do not know how many. I do not pretend to be familiar with stocks carried by all the branch houses and main warehouses. The urinals are special because the outlet is for a Durham fixture, it goes down straight, but the outlet for the slop sink goes through the wall. Q. Now what difference in the connection was there between an ordinary job and a Dunham job? A. An ordinary job consists of a cast iron pipe with crooked joints and leaded joints. The Dunham job has screw connections with recessed fittings. Those fittings came with the urinals according to this order which we placed. The slop sinks were special for three reasons, and they were furnished in accordance with the specifications. Q. Now, I will ask you if the specifications did not say that they were to be standard, with outlet through the wall, calling attention to the specification here, Exhibit 266. I will ask you if this is not exactly what the specifications say about that

(Testimony of M. O. Herber.)

(handing witness paper). A. Standard. Q. Is that what the specifications call for, standard without outlet to walls? A. Yes, but "standard" interpretation here is that there are three sizes all under that one number, and standard that the outlet to the wall might be used in some of the other sets in here. It might be standard as far as this interpretation is concerned, but it is not a standard fixture, as we use that word here in town. Q. Then your definition of standard or special is merely whether or not Ben Olson Company in this city has or carries that particular item, is that right? A. Not particularly Ben Olson Company, but the plumbing [712] ordinances, or the usual custom in town. Q. It is not any question whether or not it is standard with the jobber from whom you purchase it? A. It is not standard here in town with the jobbers. We know all the jobbers. Q. You do not mean to say that Crane Company never made or furnished slop sinks of this type or pattern, do you? A. No, I do not say that. Q. You do not mean to say that this was an unusual type of slop sink for Crane Company to furnish? A. It is here in town, yes. Q. To be furnished here in town, but not for them to make and furnish to the trade generally? A. My experience would only be between here and Seattle, there I know it is special, but in the country generally there is a possibility. Q. You said that one of the reasons that this was a special, because in this case the outlet was to the wall instead of to the floor,

(Testimony of M. O. Herber.)
was that right? A. Yes. Q. And that this plate here showed an outlet to the floor instead of to the wall? A. No, I did not make that statement. If I did I do not remember the plate number particularly. I would have to refer to the plate number. Q. Let me ask you this: these slop sinks are all provided with a trap beneath them, are they not? A. Yes. Q. That is a trap in that sense simply an elbow in the pipe to prevent the sewer gas from backing up? A. This is a fixture that goes to the wall instead of to the floor. Q. I call your attention to plate B–4984 on page 97, and ask you if that plate does not show the outlet going to the wall instead of to the floor? A. Yes. Q. Then, in the ordinary course of trade as a plumber looking at this catalogue, you would say that an outlet to the wall of this building there, was standard according to the Crane Company catalogue? A. It is special with us. Q. I asked you if it would not be standard in accordance with the catalogue. I am not asking you now as to your experience? A. Standard means being kept in stock. I would still insist it was special, as far as that plate number shows, and as I said, a while ago, there are other plate numbers there that are still more special than that. [713] Q. What was the size of this slop sink? A. 18x22, I think. Q. I will ask you if this catalogue does not expressly list that size slop sink? A. Yes, it does. Q. Do you know how large a stock of these slop sinks Crane Company carry? A. They do not carry any with the wall

(Testimony of M. O. Herber.)

outlet. Q. They do not carry any with the wall outlet? A. No, sir. Q. You mean here in Tacoma? A. Here in Tacoma, sure. Q. Your statement only was that they do not carry it here; in other words, when you say that they do not carry anything, you refer always to the local branch here in Tacoma? A. Yes. Q. You have no reference to their factory or their main warehouse elsewhere? A. No. Q. Now, you ordered some pipe from them, did you not? A. Yes. Q. That pipe was for most part, a standard size? A. Standard size, yes, with the exception— Q. Was that bought here, or was that shipped in here from somewhere else? A. Shipped in. Q. Was not carried here, was it? A. No. Q. Had to be shipped in? A. Yes. Q. Now, do you know when you placed the order,—I will ask you this: did you place this order on the day it bears date, referring to identification 270? A. Yes. Q. Now, you said something about some of this material having to go through the kiln; what material were you referring to? A. The closet bowls. Q. That was the only vitreous ware in the order,—the rest of it was all enamelled iron? A. Yes, I beg your pardon, except urinals. Q. Those had to go through the kiln too?

The COURT.—What was the reason for that? A. The lavatories and the slop sinks are made of cast iron enamelled, and the closet bowls and urinals and stools are solid porcelain, throughout. Q. I do not understand why they had to go through the kiln after the order, weren't they in stock any-

(Testimony of M. O. Herber.)

where? A. No, the closets particularly. No, I did not make that statement about the urinals, your honor, but the wash-bowls being a wall outlet made it a special fixture and not kept in stock even by the manufacturers. Q. Now, this part of your order, B–1726, refers to the plate shown on this catalogue, page 374, in the upper right hand corner, doesn't it? [714] A. Yes, sir.

Mr. METZGER.—We will offer at this time in evidence, the order by which they ordered the stuff.

The COURT.—It will be admitted.

Said order was received in evidence and marked Exhibit 270 (Langhorne), as follows:

Defendant's Exhibit No. 270.

(Langhorne.)

From Crane Company.

Date March 1st, 1920.

Priced by H. & P.

To BEN OLSON COMPANY.

Copy of order for Plumbing fixture for Scandinavian-American Bank.

86—B 2716. Wall Closets with #18–5 Whalebonite seats @ ....71.15 each

33—B 4174—18″ Regular selection Porcelain urinals with outlet connection and Cram air controlled flush valve @ 63.19

24—B 440—20x24″ Enamel Lavatories with trimmings @ 37.95

(Testimony of M. O. Herber.)

238—B 487—20–24″ Enamel Lavatories
with trimmings @ 27.10

16—B 4984—18x22″ Enamel Slop sinks
with bibbs and wood guards @ 38.50

Q. You testified that there was some $8,000 profit which you expected to make, which you would have made had this contract been completed? That includes the profits which would have been made on the installation of the radiation and heating plant? A. Yes, sir. After we had furnished the balance of the material that was cancelled and what was taken back and not expended labor, that would leave a difference besides these items already charged. Q. Now, all the fixtures which you cover by your estimates 5 and 6, except $262, are taken and ordered in accordance with these general specifications here, are they not? A. You mean estimates 2 and 3? Q. No, estimates 5 and 6. A. O, yes, 5 and 6, according to the specifications. That was part of the specification,—part of the [715] order was to be according to the specification. Q. What I am getting at is this: Those fixtures were ordered strictly in accordance with the specifications? A. Yes, sir. Q. Taken from the specification? A. Yes. Q. In accordance with the provision in the specifications as follows: "Following fixtures are taken from Crane Company's catalogue and circular 531–D? A. Yes. Q. Now about these Hurlbut fittings which you have been talking about. You say there are 24 different styles of them. A. 24 different kinds of Hurlbut fittings.

(Testimony of M. O. Herber.)

Q. Manufactured of that particular kind to fit the various requirements of the different jobs upon which they may be required or used? A. All of the fittings may be required on one job; one job might take only half of the fittings. Of course that would be unusual. Q. The reason for that, in the installation of the closets, its location to the rest of the plumbing in the wall, may require either a right or a left fitting? A. Correct. Q. And the plumbing and supply houses want to know the various requirements in order to provide the proper fittings, is that right? A. Yes. Q. And for that reason they have 24 kinds of this particular fitting? A. Yes, sir. Q. Which they are providing right along to the trade wherever this particular class of fittings, the Hurlbut fittings, are specified? A. And made up for the order.

(By Mr. BONNEVILLE.)

Q. But outside of the Hurlbut fittings, couldn't you order directly from the catalogue and get them? (Meaning items of Exhibit 257.) A. Well, the specifications rule supreme above this particular order; as in the lavatory item, it gives the plate number, but does not mention the securo waste, which made it a particular fitting. You could not specify this plate number for a securo waste and then have a fair chance at any time, of getting it, but it would require further communication and so forth to get it all fixed up. Q. But they carry all these things in stock? A. They [716] do not. Q. What don't they carry? A. They don't carry the

(Testimony of M. O. Herber.)

closets. They carry a limited amount of urinals. They would not carry two per cent of these particular lavatories. They would not carry any of the slop sinks. Q. You mean here in Tacoma? A. Yes. Q. Now, there has been considerable figuring as to a certain amount of material furnished and amount of labor done. The Ben Olson contract was a contract, wasn't it, to furnish plumbing and heating materials and install that same material into the building, wasn't it? A. Yes. Q. Complete? A. Yes. Q. That was for your contract price, you were to do both of those things? A. Yes. Q. And your profit after you have figured it on that would be the profit you would have made had you completed the job, wouldn't it? A. Yes. Q. Both as to labor and material? A. Yes. Q. So that really your contract was for a completed job of installation in the building, wasn't it? A. Yes.

(By the COURT.)

Q. Has your company made any effort or inquiry of the wholesalers or jobbers to see how much they could realize out of this stuff which you have on hand? A. We have, your Honor, and very, very unsatisfactory results; that is on the pumps, that we hold that shows some $1500 the manufacturers themselves only allow us $300.00. Q. 20 per cent? A. 20 per cent is what the manufacturers would allow on the pumps. Q. Anything else? A. The lavatories are one of the largest items, and we cannot figure we can realize beyond 20 to 25 per cent on that item. Q. Have you made any inquiries?

(Testimony of M. O. Herber.)

A. Yes. Q. Any correspondence? A. We have corresponded in the immediate vicinity and we have met with no better success than we did with some shipments we held for a number of years,—they simply wore out, shop worn in our shop, and that was intended originally for the Perkins Building, and we held them over for ten years.

WITNESS.—That would be possibly the best reason, but the real situation is they are so extremely special that there is practically [717] no disposal of them.

Redirect Examination.

(By Mr. STILES.)

Q. In other words, you will have to find another building something like this one before there will be a demand for this material? A. Yes. Q. I understand you to say there were about $24,000 worth of the material in the building now? A. Yes. Q. Of the material that is in the building now, how much of it, if any, was furnished by Crane Company for the purpose of this building? A. In the first place I used $20,000 as a rough estimate, as a tentative glance over the proposition. I may be several thousand dollars wrong. I did not tabulate it. Q. Now, is there any of that material in the building that is there now that was put in by you out of your shop or you had originally purchased from Crane Company? A. No. Q. None at all? Now in your estimate number 2,— A. I beg your pardon? You are asking if we took stock we held in our own stock and put it over in the

(Testimony of M. O. Herber.)

building, that I originally bought from Crane Company? *A.* Yes. A. There is a possibility there might be a few items that had been gotten some time before, but all of the items we did furnish out of our own stock, we took back from the building and gave them credit for, so that that will be back in our stock. But all the stuff that is at the building, that Crane Co. are claiming, we left that at the building. Q. Were you required to do that? A. Yes. Q. Now, I understand you to say that the $20,000 of it there that Crane Company have not been paid for? A. What is the question? Q. Of that material, I understand you to say that there is $20,000 of it there, that Crane Company have not been paid for? A. Well, there is,—they are claiming, but whether it applies to that particular amount, I doubt, because the $20,000 lien claim takes in other items besides that. Q. Their lien claim, as I understand it, takes in these items they have in storage here? A. Yes. Q. And their [718] claim was made here, as you are aware, is something over $20,000? A. Yes. Q. And their claim therefore includes that in storage as well as whatever there is in the Building? A. It includes closets particularly that are not included in the $24,000.

Mr. STILES.—I have finished my testimony with the exception of what testimony Crane Company may want to put in, that I may want to use in connection with this case.

The COURT.—It will be so considered and understood.

Mr. STILES.—I want to put in evidence the minutes of the meeting of the Scandinavian-American Bank of the date of November 25, 1919, page 403 of the minute-book.

Mr. OAKLEY.—The whole book is in, and that is in special.

The COURT.—Well, page 403 of the minute-book will be your special exhibit 271, and the whole minute-book is exhibit 183?

Mr. STILES.—I did not know the whole minute-book was in, and I would have objected very much to the whole minute-book. I only want page 403.

Said page 403, minute-book Bank, was received in evidence and marked Exhibit 271 (Stiles), as follows:

Defendant's Exhibit No. 271.

(Stiles.)

MINUTES OF REGULAR MEETING OF THE BOARD OF DIRECTORS

of the

SCANDINAVIAN-AMERICAN BANK OF TACOMA

Held in Directors' Room of the Bank on the 25th day of November, 1919.

The regular weekly meeting of the Board of Directors of the bank was held in the Directors' room of the bank on the 25th day of November, 1919, at the hour of 3:00 P. M.

The following Directors were present:

J. E. Chilberg O. S. Larson
Gustaf Lindberg Charles Drury
George G. Williamson

J. E. Chilberg, president of the bank, presided at the meeting.

On motion duly made, seconded and carried, the Scandinavian-American Building Company was voted a temporary credit of $15,000.00, to be secured by deed to the lot to that certain property known as the Drury property adjoining the building of the Scandinavian-American Bank on the North, and more particularly described as follows, to wit: [719]

Lot 10, in Block 1003, as the same is known, shown and designated upon a certain plat filed for record with the auditor of Pierce County, Washington, on February 3, 1875, entitled "Map of New Tacoma, W. T."

* * * * * * * *

No further business coming before the Board, on motion, the meeting adjourned.

——————————,
President.

Attest: ——————————,
Secretary.

Mr. STILES.—Also in connection with this case I wish to call upon counsel for the conveyance from Drury, or whoever it was, to the bank Lot 10, and also for the Bank's conveyance to the Building Company of Lots 11 and 12, which I wish to

(Testimony of M. O. Herber.)

put in evidence, and in addition to that, in connection with our case, we want to show the deposition of Charles Drury, page 3, and also the deposition of Mr. Taylor, taken by the McClintic-Marshall Company, and letters exhibits 7, 8, 9, 10, 11, 12 and 14 of the exhibits in connection with the testimony of Taylor.

FROM CLAIM OF CRANE COMPANY.

Testimony of Frank Downie, for Crane Company.

FRANK DOWNIE, witness for Crane Company, duly sworn, testified:

(By Mr. FULTON.)

WITNESS.—I am credit manager of the Seattle and Tacoma branches of the Crane Company; have been with that company over twelve years. Our Company had dealings with Ben Olson Company in reference to the furnishing of plumbing materials and supplies for the Scandinavian-American Building. Witness produces the original claim of lien of Crane Company admitted in evidence as Exhibit 272, as follows: [720]

Defendant's Exhibit No. 272.

(Fulton.)

State of Washington,
County of King,—ss.

CRANE COMPANY, a Corporation,

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, and BEN OLSON COMPANY, a Corporation.

NOTICE OF CLAIM OF LIEN FOR MATERIALS FURNISHED.

NOTICE IS HEREBY GIVEN that on the 29th day of June, 1920, the undersigned, Crane Company, a corporation, was employed by and at the request of Scandinavian-American Building Company, a corporation, through its duly authorized agent, Ben Olson Company, a corporation, commenced to furnish materials to be used and which were used upon the following described property in Pierce County, Washington, to wit:

> Lots ten, eleven and twelve in Block one thousand and three (1003) as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," filed for record in the office of the Auditor for Pierce County, Washington Territory, Feb. 3, 1875.

in the construction of that certain building or structure situated thereon, an office building.

That Scandinavian-American Building Company,

a corporation is the owner and reputed owner of the said land and the said office building or structure situated thereon and that Ben Olson Company, a corporation, at all the times herein mentioned was the agent of the said owner for the construction of said building or structure, and for the ordering of materials therefor.

That all of said land hereinabove described is necessary for the convenient use and occupation of the said office building or structure.

That the undersigned ceased to furnish said materials on the 15th day of January, 1921, and ninety (90) days have not elapsed since said last named date; that the value of the said materials was and is twenty thousand four hundred sixteen and 80/100th dollars ($20,416.80); that there is hereto attached, marked Exhibit "A" and made a part thereof an itemized statement of said materials, which consist of plumbing supplies.

That the claimant undersigned claims a lien upon the said building or structure, said office building above described and the land which the same is situated for the sum of twenty thousand four hundred sixteen and 80/100ths dollars ($20,416.80).

That claimant has in all respects duly and regularly complied with all the laws of the state of Washington, entitling it to file and enforce this, its lien for said materials.

CRANE COMPANY, a Corporation,
By L. B. PEEPLES,
Mgr.

Verified Apr. 9, 1921. Recorded Apr. 11, 1921. [721]

Quantity	Size	Description	Price	Extension	Total
		EXHIBIT "A" 1.		Tacoma, Wash.,	6-11-20.
		BEN OLSON COMPANY,			
		City.			
18′ 7″4″		Nat FW Galv Pipe	118.50		22.02
		EXHIBIT "A" 2.	6.92	c ft	85.91
241-5	½″	Blk. Genuine W. I. Pipe		Tacoma, Wash.,	7/1/20.
342-10	1¼″	ditto	17.58		323.97
350-0	1½	"	21.02		283.77
764-0	2½	"	47.00		359.08
64-1	3½	"	74.11		49.49
125-10	5	"	118.95		149.67
134-3	6	"	154.24		207.07
255-10	8	"	208.16		532.54
076-10	¾	"	10.59		219.94
463-1	1¼	"	20.17		295.10
325-6	1½	"	25.31		841.68
182-8	2½	"	54.41		643.49
148-2	3½	"	85.56		126.77
768-7	6	"	178.58		1372 53
					5489.01
		EXHIBIT "A" 3.		Tacoma, Wash.,	8/5/20.
1	4″	#1028 Galv. Drg. Y	6.75		5.40
		20			
		EXHIBIT "A" 4.		Tacoma, Wash.,	9/3/20.
			c		
69′ 7″	¾″	Blk Genuine WI Pipe	8.80	ft net	243.72
88-2	1	ditto	13.00	do	336.46
08-5	2	"	30.45	do	367.96
32-7	3	"	61.96	do	515.87
02-11	4″	"	87.58	do	177.72
56-11	10″	"	226.48	do	128.91
87-6	½″	Galv Genuine W I Pipe	8.62	do	223.04
40-8	1	ditto	15.65	do	209.81
06-11	3	"	71.65	do	2011.16
					4730.58
		EXHIBIT "A" 5.		Tacoma, Wash.,	9/30/20.
1	3 x 1¼	Galv. Mall. Tee	7.60	7.60	
1	3 x 2	ditto	7.60	7.60	
		60		15.20	6.08
2	3 x 2	Face Bushings	.70	1.40	1.33
		5			7.41

Quantity	Size	Description	Price	Extension	Total
		EXHIBIT "A" 6.		Tacoma, Wash.,	10/15/20.
1	6	#1020 Galv. Dr. Fitting	16.50	16.50	
39	6 x 4	#1021 do	18.50	721.50	
6	6	#1028 "	18.50	111.00	
2	6	#1001 "	13.15	26.30	
1	6	#1003 "	11.00	11.00	
[722]					
		EXHIBIT "A" 6 Brought Forward.			
8	4 x 1½	#1029 Galv. Dr. Fitting	7.40	59.20	
2	4 x 3	#1029 ditto	7.40	14.80	
10	4 x 4	#1028 "	6.75	67.50	
4	4 x 4	#1020 "	6.15	24.60	
87	3 x 1½	#1029 "	6.10	443.70	
4	3	#1028 "	4.65	18.60	
1	3	#1001 "	3.10	3.10	
3	3	#1003 "	2.55	7.65	
39	2½ x 1½	#1029 "	4.00	156.00	
3	2½	#1028 "	3.70	11.10	
6	2	#1024 "	2.30	13.80	
18	2	#1020 Galv. Dr. Fitting	1.50	27.00	
35	2	#1059 do	3.50	122.50	
20	2	#1001 "	1.15	23.00	
39	2	#1003 "	1.00	30.00	
120	1½	#1024 "	1.50	180.00	
100	1½	#1020 "	1.00	100.00	
10	1½	#1057 "	1.00	100.00	
50	1½	#1058 "	.70	42.00	
250	1½	#1003 "	.67	167.50	
50	1½	#1001 "	.72	36.00	
		38—5%		2434.35	1433.

Quantity	Size	Description	Price	Extension	Total
86					
		EXHIBIT "A" 7.	Tacoma, Wash., Jan. 5, 1921.		
		Crane Expedio Heavy Vitroware Wall closets wf 1½" spud and hooded rear inlet, extended flushing lip and S/A			
86		B-2341 Concealed Rgh Brass Air controlled flush valve, with N. P. Brass handle, complete with conn. from valve to bowl wall to be (") think			
86		B-3438 (18-5) Whalebonite Mahogany finish serpentine seat open front & back, N. P. concealed hinge with check hinge — parts for Expedio WH bowls wf extended lip.			
86		Galv. Crane Hurlbut Drainage Fittings as follows:			
		27—Y-641—4 x 4 #1 R. Hand Galv.			
		14 ditto #3			
		2 " #5			
		2 " #7			
		18 Y—643 4' x 4" #1 Left hand Galv.			
		17 ditto #3			
		1 " #5			
		1 " #7			
		2 " #9			
		2 " #11			

723]

Exhibit "A" 7 (Continued)

Quantity	Size	Description	Price	Extension	Total
258	⅝"	W. I. Galv. Studs wf one brass Jexagon but and one Galv. Iron Nut.			
86	4"	Electro Galv. W. I. Nipples			
86		Graphite treated Asbestos Gaskets			
258		R. B. Washers for ⅝" Studs			
258		N. P. Brass cap nuts			
258		N. P. Brass Washers	71.15	net ea.	$6118.90

Quantity	Size	Description	Price	Extension	Total
		EXHIBIT "A" 8.		Tacoma, Wash.,	1/6/21.
6	4″	Galv. Nipples 30	1.35	8.10	5.67
2	2″	#1005 Galv. Drg. Fittings	1.00	2.00	1.60
		20			7.27
		EXHIBIT "A" 9.	Tacoma,	Washington,	1/6/21.
3	4″	#1003 Galv. Drg 45 Deg. Ells	4.00	12.00	
5	3″	#1003 ditto	2.55	12.75	
		20			
				24.75	19.80
24	1/12	Galv Mall Locknuts	.52	12.48	5.34
		55–5			25.14
		EXHIBIT "A" 10		Tacoma, Wash.,	1/7/21.
1 Pc	6″	Nat FW Galv. Pipe 2¾″	266.00	.61	
2	6″	Threads	1.05	Net ea/	
				2.10	
					2.71
		EXHIBIT "A" 11.		Tacoma, Wash.,	1/11/21.
3	6″	#1003 Galv. Dr. Fittings	11.00	33.00	
1	6″	#1001 do	13.15	13.15	
		20		46.15	36.92
		EXHIBIT "A" 12.		Tacoma, Wash.,	1/12/21.
1	6 x 4	Blk Bushing	1.25		1.00
		20			
		EXHIBIT "A" 13		Tacoma, Wash.,	1/13/21.
2	6″	Threads (on own pipe)	1.05	net each	2.10
		EXHIBIT "A" 14.		Tacoma, Wash.,	1/14/21.
3 Pcs	6″	Galv. Pipe 0′ 3½″ T. B. E.	227.00	2.00	
6	6″	Threads	1.05 net ea	6.30	8.30
[724]					
		EXHIBIT "A" 15.		Tacoma, Wash.,	1/14/21.
4	6 x 4″	#1021 Galv. Dr. Tees	18.50	74.50	48.10
		35			
		EXHIBIT "A" 16.		Tacoma, Wash.,	1/15/21.
2	6″	#1000 Galv. Dr. Elbows	11.00	22.00	
2	6″	#1003 " " Deg. Elbows	11.00	22.00	28.60
		EXHIBIT "A" 17.		Tacoma, Wash.,	11/17/20.
2411–11	4″	Galv. Genuine W. I. Pipe	101.39 c ft		$2445.45
		EXHIBIT "A" 18.		Tacoma, Wash.,	1/5/21.
1	6 x 3	Blk Busjing		1.25	1.19
		5%			
		EXHIBIT "A" 19.		Tacoma, Wash.,	1/5/21.
1 Pc	6″	Galv. Pipe 0′ 3½″ TBE	266.00	.77	
			1.05 net ea	2.10	
					2.87

[725]

(Testimony of Frank Downie.)

Leave granted counsel for Crane Company to amend Exhibit 272 by alleging that the date of the first delivery was June 29th, 1920, instead of June 11th as alleged.

WITNESS.—I am familiar with the property described in Exhibit "A"–No. 2, attached to said lien for $5,489.01. This particular shipment was a carload of pipe unloaded and checked out by our men, by one of Ben Olson's men and Mr. Glenn of the Scandinavian-American Building Company, and was delivered to the Scandinavian-American Building Company's building. Some of it has already been installed and some of it is over in the building now. The prices set opposite the various items delivered and constituting the total of $5,489.01 are the reasonable and market prices of that property. Exhibit "A"–No. 3 attached to the lien, calling for an item of $5.40, was delivered to the building on August 5, 1920, and that amount is the reasonable value of the property delivered. Exhibit "A"–No. 4 attached to the lien is an item of $4,730.58 and is another shipment of pipe unloaded in the same way as the first one checked out by us, by Ben Olson Company and also by Mr. Glenn of the Scandinavian-American Building Company and delivered to the building. The value of the various items set out in the exhibit is their reasonable market value. Exhibit No. 5 attached to said lien is an item of $7.45, which is the reasonable value of the property which was ordered by Ben Olson Company for the Scandinavian-American Building Company and

(Testimony of Frank Downie.)

taken by Ben Olson Company. Exhibit "A"–No. 6 is an item of $1,433.83 covering property which was ordered by Ben Olson Company and delivered to the Scandinavian-American Building, consisting of drainage fittings, and the value of the items as set forth in said exhibit is the very reasonable market value. Exhibit "A"–No. 7 attached to said lien notice calls for a total of $6,118.90, consisting of 86 toilet outfits. The value assigned is the reasonable market value of said complete outfits. These outfits are divided into four parts: the bowl, the valve, the seat, and the fitting or pipe which connects with the sewer connection. [726] One complete outfit was delivered at the building as a sample. Q. What have you to say as to the delivery of the fittings? A. On this particular shipment of 86 outfits, Ben Olson took away, not only this one complete outfit as a sample, but they also took away the 86 fittings, what we call Hurlbut fittings, which is the connecting part of the outfit and necessary to put through the wall of the building while the job is being roughed in, before the finishing is begun; it is necessary to fit this fitting in there. Then later the remainder of the outfit, the bowl, tank and seat is fitted on that. Those 86 fittings were taken away from our building on January 5, at the request of Ben Olson Company. He was particularly notified at that time that the taking away of that fitting constituted the delivery of the entire material, because that outfit was no use to us without that outfit. Q. And now the 85 bowls and

(Testimony of Frank Downie.)
85 vales ad 85 seats are still in the warehouse? A. Yes, sir. Q. Do you know whether or not these are made in special sizes? A. They are made special at the factory at our request. Q. They were made specially for that building? A. Yes, sir. Q. Now, having been made special, Mr. Downie, how is their value affected by reason of that? A. The value at the present time is speculative, as long as we hold them. In fact they are useless to us until some other jobs come along where a particular building is going up and some particular architect, specifies that particular outfit; unless they do that these things are on our hands and useless. Q. What have you to say as to these fittings and bowls being of a high class, expensive nature? A. They are all of the very best material, high class. Q. And are they carried in stock? A. No, sir, we never carry them in stock. Q. What can these bowls and seats be used for—without the fittings, the Hurlbut fittings? A. How is that? Q. Can these bowls and seats be used without the fittings, the Hurlbut fittings? A. No, sir. [727]

Cross-examination.

(By Mr. OAKLEY.)

This order was placed by Ben Olson Company; by written orders. Order for the pipe was placed February 26, 1920, it was all delivered at the building and is there now. The other big item called combined toilet lavatories, was ordered February 27, 1920. These orders constitute the contract between us.

Order produced by witness, received in evidence and marked Exhibit 273 (Receiver), as follows:

Defendant's Exhibit No. 273.

(Receiver.)

Tacoma, Washington, February 27, 1920.

Crane Company,
City.

Dear Sirs:

We herewith place order for the fixtures for the Scandinavian-American Bank Building according to Plans and Specifications by Frederick Webber, Architect:

86 Wall Outlet Closets complete with valves @.......... .... 71.15
33 Urinals 18″ Complete with valves and outlet connection @............... 63.19
24 Lavatories for Toilet Room with trimmings @............. .... 37.95
283 Lavatories for Offices with trimmings @ 27.10
16 18x22 Enameled Slop Sinks with bibbs and wood guards @................ 38.50

Kindly confirm this order giving us plate numbers. As our contract calls for completion by December 10th, it is necessary that we have roughing in measurements for all these fixtures in the very near future.

Yours respectfully,

BEN OLSON COMPANY,
By M. O. HERBER.

(Testimony of Frank Downie.)

WITNESS.—It specifies fixtures according to plans and specifications of Frederick Webber; by whom furnished, I do not know.

We got sufficient information about the 33 urinals etc., also for the 24 lavatories with trimmings, including instructions according to specifications. Mr. Prescott, the assistant manager, got that. The prices mentioned, namely closets at [728] $71.15 a piece and so on down, is the price we quoted for these articles; that was below the market price.

Q. Now, you mean to say that upon the state of that order it was necessary to have these items specially built? A. Absolutely. Q. In your factories? A. Yes. We never carry it in stock; we carry stock that is salable. The bowls that go to make up this stock are not salable unless you get a particular building where these particular bowls are specified by the architect. We have no special building going up of any size that would use them; there are no two specifications alike and there is a different type of bowl and a different type of urinal and a different type of lavatory going into each building. Q. Why do you carry that as a catalogue number, then? A. We carry in our catalogue everything we can get for our customers. Of this particular item we probably carry several dozen types. We do not manufacture these things at all; they come through the manufacturer we deal with. Crane Company manufacture fittings; Hurlbut fittings.

(Testimony of Frank Downie.)

The COURT.—Q. Do you know whether or not the manufacturers carry these in stock? A. They do not carry them in stock. They are only made when orders come in from different branches, requesting them. A–No. 6, $1,483.00, is what we call Drainage fittings. They were ordered March 11, 1020; delivered October 15, 1920. That was a special order from Olson Company.

Order produced, received in evidence and marked Exhibit 274 (Oakley), as follows:

Defendant's Exhibit No. 274.

(Oakley.)

Date, March 11, 1920.

Order No. 27—Crane Company.
Ship to BEN OLSON CO. (Scan. Amer. Bank).
At Tacoma.

All Galvanized.

1—6 x6 —90 Deg. Y—Fig. 1020
39—6 x4 —90 " Y— " 1021
6—x 6x —45 " Y— " 1028
2—6″ —Long Turn 90° Ell Fig. 1001
1—6″ —Short " 45° " " 1003
8—4 x1½—45° Y—Fig. 1029 [729]

Exhibit 274 (Continued).

2—4 x3 —45° Y—Fig. 1029
10—4 x4 —45° Y— " 1028
4—4 x4 —90° Y— " 1020
73—3 x1½—45° Y— " 1029
4—3 x3 —45° Y " 1048
1—3 —Long Turn 90° Ell Fig. 1001
3—3 —Short " Ell 45°— " 1003

(Testimony of Frank Downie.)

39—2½x1½—45° Y—Fig. 1029
3—2½ — 90° Y—Fig. 1028
6—2″ Cross Fig 1024
18—2 x2— 90° Y—Fig. 1020
35—2″ Plain P. Trap " 1059
20—2″ Long Turn 90° Ell 1001
30—2″ Short " 45° Ell 1003
120—1½ Don 90° Y—Fig. 1024
100—1½ — 90° Y—Fig. 1020
10—1½ — 90° Y Ell Fig. 1057
50—1½ — 45° Str. Ell " 1058
250—1½ — 45° Ell " 1003
50—1½ — 90° Ell " 1001

When they put in an order we would take it at different prices for each item. This material which was delivered in October, was taken over to the building. Shortly after the operation closed I checked it up and some of the fittings had been installed and the rest were still lying on the ground. "A"-7, $6,118.90, closets, fittings, etc., was included in the order of February 20th, the final delivery of that order has not really been made of the entire shipment; that is the one that I explained that the 86 Hurlbut fittings and one outfit complete had been taken away and that the remainder of the shipment is over in our store building here in Tacoma. 85 Hurlbut fittings and one complete outfit was delivered on the day we billed our material and there were 85 complete outfits at our place, but on account of them taking away the connecting outfit we told them we would have to consider it was a complete shipment.

Final delivery of Exhibit "A"–2, pipe, $5,489.01, was delivered July 1st, 1920.

Order produced, received in evidence and marked Exhibit 275 (Oakley), as follows: [730]

Defendant's Exhibit No. 275.

(Oakley.)

Tacoma, Washington, Feb. 26, 1920.

Crane Company,
City.

Dear Sirs:

Kindly enter our order for the pipe Scandinavian-American Bank Building, same to be genuine wrought iron pipe:

1000 ft.	½ Blk.		@	6.92	per	C
2700 ft.	¾ "			8.80	"	"
2500 ft.	1 " "			13.00	"	"
1800 ft.	1¼ "			17.58	"	"
1300 ft.	1½ "			21.02	"	"
1200 ft.	2 "			30.45	"	"
757 ft.	2½ "			47.00	"	"
816 ft.	3 "			61.96	"	"
54 ft.	3½ "			74.11	"	"
200 ft.	4 "			87.58	"	"
112 ft.	5 "			118.95	"	"
120 ft.	6 "			154.24	"	"
330 ft.	8 "			208.16	"	"
55 ft.	10 "			266.48	"	"
2600 ft.	½ "	Galvanized		8.62	"	"
2000 ft.	¾ "	"		10.59	"	"
1300 ft.	1 "	"		15.65	"	"

(Testimony of Frank Downie.)

1400 ft.	1¼	"	"	20.17	"	"
3300 ft.	1½	"	"	25.31	"	"
1400 ft.	2	"	"	35.50	"	"
1150 ft.	2½	"	"	54.41	"	"
2800 ft.	3	"	"	71.65	"	"
132 ft.	3½	"	"	85.56	"	"
2400 ft.	4	"	"	101.39	"	"
0 ft.	5	"				
750 ft.	6	"	"	178.58	"	"

We expect to need this pipe in sixty to ninety days, so govern yourselves accordingly.

Yours truly,

BEN OLSON COMPANY,

By M. O. HERBER.

WITNESS.—That order was a requisition for all the pipe.

In Exhibit "A"–4, $4,730.58, was delivered November 17, 1920. Our claim is for $21,000 odd dollars, which covers nothing but what we have actually delivered on the job, with the exception of 85 outfits, which have been discussed. [731]

Further Cross-examination.

(By Mr. METZGER.)

Witness is shown a catalogue and asked if it was Crane Company Catalogue issued in 1915.

WITNESS.—Yes, that is a 1915 catalogue.

Q. Now in that catalogue you describe a large number of articles, plumbing fixtures by number?

(Testimony of Frank Downie.)

A. Yes.

WITNESS.—We are not prepared to supply all of those articles from stock. We mean that anything that is shown in Crane Company catalogue can be suppled at any time it is required, by order, that is, if it can be had. Many articles in that catalogue are what we call special and are made on request. We do not offer every article shown in the catalogue as a standard article of that kind. We offer it just as it is shown. In the catalogue we say "give explicit and complete specifications for goods not standard, accompanied if possible, by sketch." If an article is described by reference to the plate number here it would not be a standard article within the terms of these instructions. If you order according to plate number no other instructions were required and if there were any other devices or changes from the plate number, they have to be explicit and complete specifications. I might perhaps explain that outfit in there a little clearer so that you will understand what we were up against on these particular 86 articles. The biggest manufacturer of these outfits in the United States is the Standard Sanitary Manufacturing Company of Pittsburg. We originally tried to place the order for the bowls making up this outfit with them, and they absolutely turned it down, stating that they did not make them any more and they would not take them, and we had to look around to get these particular bowls. These bowls are shown in the catalogue by number. The Hurlbut

(Testimony of Frank Downie.)

fittings we manufacture ourselves; they are made for use of any bowl. We have to know exactly how they want them drilled. It is a heavy casting [732] and weighs practically 100 lbs; it is the piece that goes into the wall behind the closet. They can be drilled in many different ways and when they are placed we have to know where they want that particular fitting drilled. Bowls are ordered specially from fittings and are special. The fittings are drilled at headquarters, not out here, whenever we get an order of that particular type. We do not carry them in stock. We carry in stock several thousand different items of fittings, small sizes principally; what plumbers need every day. We do not carry in stock an installation for office buildings, it would have to be manufactured special. Crane Company have seventy branch houses. The same articles are not supplied everywhere. In different localities the plumbing ordinances are more or less rigid and in that way you never take the same outfit into two buildings. The plates in this catalogue are from actual photographs.

(Witness is shown Exhibit 273.)

Under certain circumstances we may accept cancellation of orders as where it puts us to no inconvenience or where the stuff ordered was to be taken right out of stock. We carry in our stock a standard line of closets, urinals, vitreous and porcelain ware, but no special line. The catalogue does not indicate what is special and what is standard. Q. That is left for you to determine yourself

(Testimony of Frank Downie.)

whether it is standard or special? A. Perhaps it could be explained a little easier this way: take yourself for instance, if you would go to Crane Company and you were going to put up a building, you would show us the kind of outfits you thought you could put in that building, and we would tell you if we had certain items in stock, but if you wanted that which is special, you would have to order it from the factory. If the architect for a building such as this were willing to use a cheap outfit, probably we could supply it from stock, but we could not supply any further stock, such as is ordinarily used in an office building, from Tacoma. The [733] same remark applies to slop sinks. Catalogues, I think you would find, particularly in the plumbing game, are gotten out mostly for the benefit of architects, so that they can tell what kind of supplies they can order. The closets that we would supply are those shown in the upper right-hand corner of page 374, 2715–2716, that is in the order.

By the COURT.—Is there anything in the catalogue that some manufacturer does not have a mould to make it?

A. No, I would say that they have moulds to make it. It must have been designed by someone.

(By Mr. STILES.)

WITNESS.—Q. Did you receive in your warehouse, some other goods for these people? A. Yes, we have some other goods over in the building which we have not included in our lien. They are urinals

(Testimony of Frank Downie.)

and lavatories made by the Pacific Porcelain Company of San Francisco. We tried very hard to get that order cancelled. The paper shown me is a letter from the Pacific Plumbing Company, dated February 8th, answering letter from our manager requesting [734] the cancellation of the order. This order was absolutely special, the work being for Crane Company only. The letter refers to lavatories and urinals which are not in our claim.

Mr. METZGER.—I object because there has been no delivery and the special contractor who might be entitled to the claim has not made any claim for it.

The COURT.—Doesn't Olson claim for this?

WITNESS.—We have billed Mr. Olsen for that material, also we have not included it in our lien. It has been billed to Ben Olson Company, charged by us against the Ben Olson Company. We expect to receive payment from them.

The COURT.—It will be admitted.

Letter admitted as Exhibit 276 (Stiles), as follows.

Redirect Examination.

(By Mr. FULTON.)

The amount of our lien claim and the amount we sued for is $20,416.80, less $22.02, and is for material actually delivered on the Scandinavian-American Building job.

Mr. METZGER.—When you say that is actually delivered it includes, doesn't it, the valve of these 85 closets? A. Yes, that has always been under-

(Testimony of Frank Downie.)
stood,—that these 85 outfits we considered delivered because they too*d* the connecting fittings.

The COURT.—If the Court should hold against that, Mr. Fulton, Mr. Fulton started out to develop the value of the Hurlbut fittings, did you get that? A. $40.00 a pie*r*ce.

The COURT.—If I should have to determine that they retained the rest of the closet, what would the value of it be? A. The combination was sold at $71.15. Take $20.00 off of that and you have $51.15.

The Hurlbut fittings are essential to the complete outfit. The remaining portions we have in our warehouse. We [735] would be very fortunate in getting $30.00 per outfit for it.

We can supply new Hurlbut fittings to take the place of those delivered by ordering them from headquarters, having them drilled in the way we want them and get them here several months afterwards. We could complete the outfit so that it was not defective in any respect for practically the value of the Hurlbut fittings which are in the Scandinavian-American Building, but after that we would have to have a customer to take them off our hands.

Redirect Examination.

(By Mr. FULTON.)

No part of this for which we have filed lien has been paid. The reasonable market value of Hurlbut fittings, separate and apart from the rest of the toilet outfit would be $20.00.

(Testimony of Frank Downie.)

(By Mr. OAKLEY.)

Q. Did you receive anything from Ben Olson Company? A. You mean any payment? Q. Yes. A. We always receive payments regularly from Ben Olson Company, yes. Q. What have you received on these orders? A. On these orders, nothing.

The COURT.—You applied it on some of these others? A. Ben Olson Company make small payments to us each month as they always did.

Mr. FULTON.—On open account? A. On open account, and applied on open account.

(By Mr. OAKLEY.)

Q. Did you apply any of it on any items furnished or prepared for delivery to the Scandinavian-American Building Company? A. No, sir. Q. During any of that period? A. No, sir. Q. How much did you receive during that period? A. What period? [736] Q. That you were delivering the material. A. Ben Olson Company were doing other jobs at the same time they were doing this bank job, and any payment we received from them we applied on open account. I can give you any payments they made any particular month. The payments were all applied on open account. Q. Were your charges all made on open account? A. The charges, with the exception of the material included on our lien, is specifically marked as Scandinavian-American Building job. Q. Well, did you bill him for that? A. We billed him for it.

(Testimony of Frank Downie.)

Q. Did you get any check in response to that billing? A. No, sir.

WITNESS.—Before we started billing out any material for this particular job, Ben Olson owed us approximately $15,000, before we charged anything on this job, and from that time to the end of the year, they paid us $16,000, which left practically the same amount owing on their account as before they started on the job at all. They are one of our biggest customers, you understand, in Tacoma, and carry always a big account, so that naturally when we got any checks in, it was cleaning up the old account . The total checks received did not amount to a thousand dollars more than the old account, during all of that period. Q. How much did they owe you at the end of that period? A. Of what period? Q. Of the year, January. A. At the end of last year? Q. Yes. A. They owed us at that time $15,786. Q. At what time? A. At the end of January, 1920, but you want to remember that,—Did you say December or January? Q. December 31. A. End of December, $15,786, but at the end of January,—I want you to remember we delivered quite a lot of material to the job in January before the thing closed up, so that the January account would show that we sold Ben Olson Company $24,349. [737]

FROM CLAIM OF CRANE COMPANY.

Testimony of H. S. Prescott, for Crane Company.

H. S. PRESCOTT, for Crane Company, sworn, testified:

(By Mr. FULTON.)

I am assistant local manager of Crane Company. I have been in that position about twelve years. I am familiar with the negotiations that led up to the sale to Ben Olson Company of plumbing supplies and materials to be used in this building in the City of Tacoma.

The item called for in Exhibit "A"–2, attached to the lien notice, amounting to $5,489.01, was a carload of pipe received by us and turned over to the Ben Olson Company and taken by their truck to the building and checked by an employee of the Scandinavian-American Building Company. Exhibit "A"–3, calling for an item of $5.20, was a small item delivered to an employee of the Ben Olson Company and taken to the building. I am familiar with the reasonable market value of plumbing goods here in the city, and the value set opposite these various items is extremely reasonable. Exhibit "A"–No. 4 attached to the lien, amounting to $4,730.58 covers a carload of pipe delivered on Ben Olson Company's order, which was unloaded in the same way as the first. It covers the second delivery on their order for pipe and was delivered to the building. The amount specified is the reasonable value of the property. Exhibit "A"–5 for

(Testimony of H. S. Prescott.)
$7.21 covers material delivered to a representative of Ben Olson Company who was working on the building, and delivered to the building. Exhibit "A"–6, amounting to $1433.83 covers the amount ordered for drainage fittings which was brought on from the factory, turned over to Ben Olson Company and delivered at the building. The amount is the reasonable value of that property. Exhibit "A"–7, calling for $6,118.90, covers the closet outfits, a portion of which were delivered to Ben Olson Company and delivered on the building, namely, [738] one outfit complete and 85 connecting fittings. The other portions of the outfit are not out at our warehouse. These outfits are in four main parts, in which one, the Hurlbut fittings, has been separated. The amount $6,118.90 is the reasonable value of the 86 outfits complete. The reasonable market value of the Hurlbut fittings bought separately would be approximately $20.00 apiece. We will take $10.00 apiece for the other portions of the outfit retained by us. That is all we could get for them. Exhibit "A"–8 is an invoice of $7.27 for small fittings delivered to the representative of the Ben Olson Company for the Scandinavian-American Building Company, our requisition stating that it was for the Scandinavian-American Building Company. Exhibit "A"–9 calls for $25.14, which was delivered to a representative of the Ben Olson Company, who was employed on the building, and is the reasonable value of the property covered thereby. Exhibit "A"–10 for $2.71 covers pieces of pipe that

(Testimony of H. S. Prescott.)
were delivered to the Scandinavian-American Building job and is the reasonable value of the property. Exhibit "A"–11 for $35.92 covers drainage fittings which were delivered to the building, and is the reasonable value of those items. Exhibit "A"–12, $100, covers an item which was picked up by a representative of the Ben Olson Company on a requisition of the bank building for use in the building. Exhibit "A"–13 for $2.10 covers labor performed by us on a piece of pipe they brought down from the building. It was threaded and returned. Exhibit "A"–14 for $8.30, covers special nipples cut for the bank job and used on the building and is the reasonable value. Exhibit "A"–15 for $48.10 covers fittings used in the new building and is their reasonable value. Exhibit "A"–16 for $28.60, covers drainage fittings used in the building and necessary therefor. Exhibit "A"–18, $2245.45, covers [739] final delivery on their original order for the pipe which was delivered at the building and used there and was the reasonable value of said pipe. Exhibit "A"–18, $1.19, covers fittings delivered to Ben Olson Company and used on the building. Exhibit "A"–19, $2.87, covers another special nipple cut for that work in the bank and is the reasonable value of it and was used in the building.

Cross-examination.

(By Mr. METZGER.)

Ben Olson Company did not make a general contract for all of the plumbing supplies and fittings

(Testimony of H. S. Prescott.)
required for their plumbing contract with the Building Company. They made piecemeal arrangements from time to time as they determined upon their requirements. Exhibit "A"–2 covers part of one contract; the other parts of that contract are in Exhibit "A"–4 and "A"–17. There were three pipe invoices, the date of the last one being November 17, 1920. It was at the time of the commencement of delivery of that order that we gave a notice which Miss Clark testified to. Exhibit "A"–5, "A"–6, and "A"–7, were separate and distinct orders placed in writing. Exhibit 270 was written in compliance with the request to confirm to order contained in Exhibit 273. The closets furnished are those indicated by the Plate No. B–2716, as near as we could pick it to fit the architect's specifications, which varied from our plate number. I am familiar with the catalogue put out by our company, which was put out for the benefit of architects, plumbers, contractors, engineers and owners, to enable them to see that we were in position to supply any kind of plumbing fixtures. Specifications and sketches had to be submitted for the closets and slop sinks. The latter, in order to have rim-guards, had [740] to have rim-guards made up that would fit the sinks. It is our practice, when an order is placed with us of this character, to order it by plate number and accompany it with sketches for details. In the closets it was necessary to show the arrangement and the thickness of the wall. Sometimes they were in a battery and the fittings

(Testimony of H. S. Prescott.)

were necessary to make up these batteries. These details do not affect the bowls or seats, every other part that has connections through the wall is affected. Not all those parts are part of the Hurlbut fitting. There is also a nipple and three bolts which are not taken out of stock but are made up to the proper thickness; that is something that is extra. It is absolutely necessary that the bolts be of proper lengths. It is my remembrance that the specifications probably named the fittings as a Crane Hurlbut, which is a particular pet of ours, but we do not put it out continuously everywhere. The city of Seattle does not accept it; it is not acceptable to their plumbing code.

$20,416.80, was the amount due Crane Company on account of materials furnished for the Scandinavian-American Building Company's Building here at the time this lien was files, no part of which has been paid, and that is the amount now due and owing.

Redirect Examination.

(By Mr. FULTON.)

Q. You said that if you could examine the specification, you could explain to Mr. Metzger, in answer to his question as to why you had to send details and specifications with the order? A. Well, the details necessary for us to send on this closet was to get the proper fittings. Those fittings, I could state here, are made up in 24 different styles or types. For instance, if you set three closets in [741] a battery, you may want types 1, 3 and 5,

(Testimony of H. S. Prescott.)

whereas if you set six, you would probably take types 1, 2, 3, 4, 5 and 6. Now it was necessary to go over these plans and in the different places in the building, and locate hoy many toilets were in a battery; then pick out your fittings accordingly. To ask, of course, that we submit sketches where-ever possible, and we do so in order to overcome any chance of error. At the same time there are also left-handed and right-handed fixtures. We do not carry those in stock; they were not standard. There was no article in the specifications that we could fill from regular stock. None of the property described in the order of the Court returning property to Ben Olson Company was covered by lien of Crane Company. None of the property covered by this lien, was returned.

Recross-examination.

(By Mr. BONNEVILLE.)

Specifications all through provide for the use of Crane Company materials as far as I know. The descriptions in the specifications do not follow the descriptions in the catalogue. This catalogue here is catalogue B and circular number 531–B. These plate numbers here where it says B–810, etc., are found in the catalogue. The architect takes a plate number as a type and does not exclude other manufacturers from bidding. It places those as a type or number and he writes the specification giving the Plate number for that type with details. Q. On these closets would the specifications differ very much from the catalogue? A. For instance on the

(Testimony of H. S. Prescott.)

seats. Q. They take a seat from any catalogue number, do they not? A. They take any seat. Q. So that all you have to do is to take out of your general stock the particular number of the seat, place it on the bowl of this catalogue number,—take two catalogue numbers [742] to make up one article, is that right? A. No, not out of our general stock. Q. Well, out of your stock of toilets? A. Yes. Q. The seat was specified as one catalogue number and the bowl as another catalogue number? A. The combination is specified as a catalogue number. Q. You said that they took a different catalogue number for the seat? A. They did. Q. Where else in these bowls are there any difference? A. There was no other difference except what is covered by the circular and catalogue.

Redirect Examination.

(By Mr. FULTON.)

Q. What arrangement did you have with the Ben Olson Company before any request was made upon you for the delivery of the goods. A. Well, we had their statement, after looking over our quotations, that the business was ours. Q. How much of it, was there anything specified as to how much of it? A. Well, they stated that practially 90 per cent of the business was ours.

WITNESS.—At that time this agreement was reached on prices. Specifications were submitted to us with the understanding that they would place requisitions as they could draw the material off the

(Testimony of M. O. Herber.)
specifications and plans. We filled those requisitions.

Testimony of M. O. Herber, for Crane Company.

M. O. HERBER, called as a witness for Crane Company, testified in answer to interrogatories by Mr. Fulton as follows:

I am familiar with the goods described in the various exhibits attached to Crane Company's lien. The prices marked after the various items are the reasonable market value of the goods. The property called for by Exhibit "A"–2, amounting to $5,489.01, went into the building and was delivered to the building. Exhibit "A"–3 calling for $5.40 likewise the [743] amount is a reasonable charge. Exhibit "A"–4 for $4,730.50 went into the building. The same is a reasonable charge. Exhibit "A"–5, being an item of $7.41, Exhibit "A"–6, being an item of $1,433.83, were all received from Crane Company and went over to the building and were used on the building. Exhibit "A"–7, amounting to $6,118.90 are the toilets concerning which I have testified in Ben Olson Company's case. Exhibit "A"–8, being an item of $7.27, was used in the building and the amount is a reasonable charge. Exhibit "A"–9, an item of $25.14, was also used in the building and is a reasonable charge. Exhibits "A"–10 and "A"–11 were received, used in the building, and those are reasonable charges. Exhibits "A"–12 and "A"–13, "A"–14, "A"–15, "A"–16, "A"–17, "A"–18 and "A"–19 were ordered for

(Testimony of M. O. Herber.)
the building and either used in the building or are on the building now.

And thereafter, and on the 28th day of April, 1922, and after the filing of the decision of the Court, in the cause; and under leave of the Court had and obtained, the witness, M. O. Herber was recalled, and testified as follows:

(By Mr. STILES.)

Q. Mr. Herber, have you made lately a comparison of the items contained in Ben Olson Company's exhibits known as Estimates 1, 2, 3 and 4? A. Yes, sir. Q. Have you that in writing? A. Yes, sir. (Witness handed counsel sheets of yellow paper.) Q. Now, what is this sheet, what does it show? A. It shows the amount of material actually at the building that was not from Crane Company. Q. And who furnished this material? A. We did—come from the shop. Q. And the total amount of it is— A. $1,173.99.

Mr. STILES.—If your Honor please, for the Court's convenience, I ask that it be admitted as an exhibit. [744]

The COURT.—It will be admitted.

Said paper was received in evidence and marked by the Clerk as Exhibit No. 357, as follows:

Defendant's Exhibit No. 357.

(Stiles.)

April 4, 1922.

The following are items in Estimates No. 1 and #2 and #4 left at the Building and not obtained from Crane Co.

(Testimony of M. O. Herber.)
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(Stiles.)

April 4, 1922.

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Estimate No. 1.

6″ soil pipe and fittings for Alley	$ 57.00	
4″ Galv. Pipe on 11th	40.00	
Cartage on Carload of pipe	48.00	145.00

Estimate No. 2.

City Water Meter and service	450.00	
100 ft. 4″ Blk. pipe for Temporary Closet	131.22	
Soil pipe and fittings	74.00	
Water pipe and fittings	15.00	
Galv. Iron Toilet trough	52.00	722.32

Estimate No. 3.

None.

Estimate No. 4.

Hangers and Angle Iron	11.50
Dynamo and cutting Oil	5.50
Steel Rods for Hangers	31.50
Hose Coupling Arco Sealit ..	25.00
Saddle Clip	35.81
Hanger Iron	6.00
Blacksmith coal	6.00
300 ft. 1/8x1 Band Iron)	
50 ft. 1/4x1 Band Iron)	
100 ft. 5/8x2 Band Iron)	
200 ft. 1x1 1/4 Stove Bolts)	35.05

(Testimony of M. O. Herber.)

Ajax Electric Wiring	78.31	
City of Tacoma Meter installed	72.00	
	306.67	306.67
		$1,173.99

Q. Now, did the decision of the Court relating to Crane Company contain any reference to the labor? A. No. Q. Which was some $2,200? A. $2,279 I believe. Q. Now, those items contained in Estimates 5 and 6 and the Godfrey material and the material released by the Court and taken back to the shop and the material at the shop, have been refused allowance. State whether or not those items would be necessary in completing that job? A. They will. Q. Now, can you state to the Court what the actual raw [745] costs of those separate items were? A. $20,231.54. Q. Well, just give us the separate items? A. Items at the shop— Q. Commence with Estimate No. 5,—Estimate No. 5, $6,132.66,—what was the actual cost of that? A. $4,385.22. Q. As to Estimate No. 6, which was $12,910.76, how much was that? A. $10,061.87. Q. And the Godfrey materials, what was that, which was shown as $2,250 in the evidence? A. $1,593.75. Q. The question is what was the actual cost of the Godfrey materials which were at the shop?

The COURT.—Estimate No. 6 he said was ten thousand—

Mr. STILES.—The Godfrey materials are at-

(Testimony of M. O. Herber.)

tached to No. 6, but the materials are at the Olson Company's shop.

WITNESS.—On the Godfrey item of $2,250, the cost is $1,593.75. Q. And other materials at the shop which were put down at $5,875.60. A. Item at the shop $5,875.60,—that raw cost $4,190.70. Q. In completing the building would you have had to use this material? A. Yes. Q. And also would you have had to use the original amount which was stated necessary to finish, $16,691.74? A. Yes, sir.

The COURT.—The $16,000 is made up of the items of $11,937 and $5,875? A. No.

The COURT.—Where do you get that $16,000?

Mr. STILES.—$16,691.74 was testified to originally as the amount necessary to complete the building.

The COURT.—You are getting at the amount of your judgment?

Mr. STILES.—Yes, that's all. We will show how it comes out after a while.

The COURT.—This item of $16,691 is what it would cost Ben Olson Company to complete what they had to do, to buy the additional materials?

Mr. STILES.—Yes. [746]

The COURT.—That he had not yet obtained?

Mr. STILES.—That he had not yet obtained. I will say this, it does include $4,900 of material that he withdrew; that is, if the same material had been replaced. It includes that.

(Witness excused.) [747]

FROM TESTIMONY IN CLAIM OF PUGET SOUND IRON & STEEL WORKS, DEFENDANT AND COUNTER-CLAIMANT.

Testimony of W. E. Morris, for Puget Sound Iron & Steel Works.

W. E. MORRIS, on behalf of claimant, sworn, testified:

(By Mr. BATES.)

WITNESS.—Am Secretary of Puget Sound Iron & Steel Works, in charge of the business. We straightened structural steel from the Scandinavian-American Building, that had been bent and twisted. Cards admitted show the time employed by the men, and the rate of wages. The bill was $495.90.

Cross-examined.

(By Mr. OAKLEY.)

$2.75 was charged for the blacksmith per hour; welder, same; helper $1.50; crane helper $2.25 to $2.50. We paid the blacksmith $1.50; welder $1.00, crane helper 57½ cents.

There is the overhead, the furnace to be kept up and the machine-shop. We figure that as about 125 per cent of the labor cost.

Redirect.

(By Mr. BATES.)

The charges on the bill shows the machinist at $1.50 an hour and shows the crane at $2.00 an hour. There is an expensive crane that is used in the handling of this material. If we only charged 15

(Testimony of W. E. Morris.)

per cent above the craneman's wages we would be losing, and we have to take into consideration the investment in the plant and there is the overhead, the expense of maintenance. Machine-shops when they go out to figure will figure from one hundred and twenty to one hundred and twenty-five per cent overhead expense. [748]

FROM DEPOSITION OF CHARLES DRURY, A WITNESS FOR COMPLAINANT, McCLINTIC-MARSHALL COMPANY.

Deposition of Charles Drury, for McClintic-Marshall Company.

CHARLES DRURY, sworn, testified as follows:
(By Mr. LANGHORNE.)

Q. Are you acquainted with a company or corporation known as the Scandinavian-American Building Company? A. I am. Have been acquainted with it ever since its organization, in December, 1919, I think. I was a director of the Company and President of it. Am still President, I suppose. Q. Are you acquainted with a corporation known as the Scandinavian-American Bank? A. I am. I was a director in the bank and chairman of the Board of Directors; was elected chairman in January, 1920; became a director in January, 1919. Q. What was the purpose for which the Scandinavian-American Building Company was organized? A. To erect and finance a bank building for the Scandinavian-American Bank, at Eleventh and Pacific.

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 7.

SCANDINAVIAN-AMERICAN BANK.

Tacoma, Washington, June 16, 1920.

C. D. Marshall, President,
McClintic-Marshall Company,
Pittsburg, California.

Dear Sir:

This morning we received the following telegram:

* * * * * * * *

In our former letter to you we pointed out that our steel contract was awarded to your company under representations that the necessary steel for the entire building was to be taken out of stock in five different yards as we remember it, and when I was in the East the last time, being with your Philadelphia representative about April 5th, I was assured that the first shipment of steel would go forward not later than the 10th of April. Now it turns out that the rolling material has been secured from [749] the mills and that the steel was not in stock at all. I wish to point out again that we have been ready to erect this steel for the past six weeks and that the delay is costing us $5,000.00 per month in interest and carrying charges on the building, and while we are not trying to attach any undue blame to your company for the delay, nevertheless, we think you ought to exert every means within your power to see that this material is moved promptly.

Hoping to hear from you very often regarding this matter, I beg to remain,

Yours very truly,

O. S. LARSON,

President.

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 8.

SCANDINAVIAN-AMERICAN BANK.

Tacoma, Washington, June 14, 1920.

Mr. C. D. Marshall,

McClintic-Marshall Company,

Pittsburg, Pa.

Dear Sir:

Enclosed herewith please find confirmation of night letter sent you to-day, and while we have no doubt that you have done everything possible about the movement of this steel, we wish, nevertheless, to point out that the foundations for this building have been completed for practically a month even though we have been delaying the work on account of the nonarrival of the steel, and that now the investment in the foundation and the real estate on which it stands is costing us approximately $5,000.00 per month during the time that the building is being delayed.

*   *   *   *   *   *   *   *

Hoping to hear from you regarding this matter, and with kindest personal regards, I beg to remain

Very truly yours,

O. S. LARSON,

President. [750]

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 9.

SCANDINAVIAN-AMERICAN BANK.

Tacoma, Washington, June 23, 1920.

PERSONAL.

C. D. Marshall, President,

McClintic-Marshall Company,

Pittsburg, Pa.

Dear Mr. Marshall:

I wish to acknowledge receipt of the following telegram from you received this morning:

* * * * * * * *

At the same time, we wish to announce that the first shipment of steel, being the car of grillage, arrived in the yards in Tacoma this morning and will be unloaded this afternoon.

I have already pointed out to you the necessity for quick action in moving this steel on account of the fact that a public institution is involved in the construction of this building, and that as far as possible, a bank should avoid public criticism, even that of being criticized for being slow in the construction of a bank building. May we not have the assurance from you that this contract of ours will have the right of way from now on?

Very sincerely yours,

O. S. LARSON,

President. [751]

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 10.

SCANDINAVIAN-AMERICAN BANK.

Tacoma, Washington, June 29, 1920.

H. H. McClintic, Vice-President,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Mr. McClintic.

This is to acknowledge receipt of your letter of June 24th.

* * * * * * * *

We are very much surprised to learn that the contract you have for furnishing steel for the Telephone Building at Seattle was let two months later than the contract for our bank building, and you have to date delivered considerable more steel to the Seattle Telephone Building than you have delivered to this bank building. I do not want to be bothering you by continually writing to your company about this matter, but I do hope that you will bend every effort to get this steel delivered as quickly as possible. You have got to realize that in this matter you are dealing with a banking institution which should at all times, as far as possible, avoid any public criticism, even on such a matter as this. Upon receipt of this letter, I would like to have you write me fully as to the progress of this steel order and when we may expect to get some more cars on the way out here.

With kind personal regards,

Very truly yours,

O. S. LARSON,

President. [752]

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 11.

SCANDINAVIAN-AMERICAN BANK.

Tacoma, Washington, July 6, 1920.

SPECIAL DELIVERY.

C. D. Marshall, President, or
H. H. McClintic, Vice-President,
McClintic-Marshall Company,
Pittsburg, Pa.

Gentlemen:

Referring to my former letters to you, I beg to enclose herewith a picture taken July 2d, during the noon-hour, of the two corners at 11th Street and Pacific Avenue, in Tacoma, showing in the extreme background, the Bank of California Building, next to it, the W. R. Rust Building under construction and in the foreground the foundations and the grillage just received for the new Scandinavian-American Bank Building. Construction on the Rust Building was started several weeks after the placing of foundations of the Scandinavian-American Bank Building had begun. Mr. Rust purchased his steel in Minneapolis, and we understand that the entire delivery will be effected on July 20th. This picture brings forcibly before us

the actual situation regarding the construction of our building.

I hope that you gentlemen, Mr. Webber and Mr. E. E. Davis, the steel erector, who has just left here, will find some way to get our steel here at once.

With the kindest regards,

Very sincerely yours,

O. S. LARSON,

President. [753]

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 12.

SCANDINAVIAN-AMERICAN BANK.

Tacoma, Washington, July 20, 1920.

Mr. H. H. McClintic,

Vice-Pres. McClintic-Marshall Co.,

Pittsburg, Pa.

Dear Sir:

* * * * * * * *

We have previously pointed out to you that the steel order was awarded to your company from among several competitors on the representation by your Philadelphia representative that the most of the steel would be taken out of stock in five of your different yards. It now turns out that you did not have the steel at all at the time this representation was made. We could have done a great deal better buying steel in Portland and one or two other places.

* * * * * * * *

If this material can be had in the country it

seems to me that it is up to your people to buy it wherever you can get it and get it out here immediately in order to save us the added carrying charges, which are accruing every day, the public criticism, and the added humiliation which has come to us by reason of the nonarrival of this steel.

* * * * * * * *

Yours very truly,

O. S. LARSON,

President. [754]

FROM DEPOSITION OF G. L. TAYLOR.

Defendant's Exhibit No. 14.

SCANDINAVIAN-AMERICAN BANK.

August 6, 1920.

McClintic-Marshall Company,

Pittsburgh, Penn.

Gentlemen:

Referring to your contract of February 5, 1920, for the furnishing of steel for the Scandinavian-American Bank Building, you, of course, are advised that there will be a substantial increase in freight rates beginning on September 1, 1920. Under your contract with us you agreed "to furnish and deliver f. o. b. cars there works, present rates of freight allowed Tacoma, Washington."

Under these circumstances we deem it proper to advise you that it is imperative that the shipments be made before September 1st.

Owing to the delays already occasioned, through no fault of ours, we are daily sustaining heavy

(Testimony of Geo. G. Williamson.)

losses; hence we urge prompt shipment of our material.

Very truly yours,
SCANDINAVIAN-AMERICAN BUILDING CO.
By CHARLES DRURY,
President. [755]

Testimony of Geo. G. Williamson, for Tacoma Millwork Supply Company.

GEO. G. WILLIAMSON, a witness called and sworn on behalf of the Tacoma Millwork and Supply Company, testified:

I was one of the trustees of the Scandinavian-American Bank until May 1920; I was also one of the trustees of the building company. Mr. Drury was president of the Building Company and seemed to be active head under the supervision of the architect and superintendent, Mr. Wells, I think Mr. Larson had most of the deals with Mr. Simpson, as far as my knowledge goes. I do not know from what source the building company got any money during February and March, 1920. I know that loans were made to the building company in April, 1920; that was reported at the director's meeting on the 7th day of May, that a loan had been made on the 14th day of April. That is when I resigned, upon finding that out. I knew nothing at all about any advance as made against the Capital stock of the building company until some time after the 8th day of January, 1921. I continued as a director of the Building Company nominally until some time

(Testimony of Geo. G. Williamson.)

after the 8th day of January, 1921. There was only one meeting, I think, between May 1920 and January 1921. I was present at a conference in Seattle at which the Insurance Company's attorneys were present and Mr. Simpson and Mr. Chilberg and Mr. Larson. There seemed to be an understanding there at that time that the Metropolitan Life Insurance Company had agreed to lend $600,000 as a first mortgage on this building. I know of no written contract to that effect. It was my impression up until the spring of 1920 that Mr. Simpson represented the Metropolitan Life Insurance Company, when I was told by the Metropolitan Life Insurance Company's attorneys in Seattle that he did not. The mortgage was made to him as mortgagee, but there was no agreement or understanding at any time that he was to be the party principal to furnish the money. It was my understanding that the Metropolitan Life had agreed to make the loan [756] when the building was constructed. I have never seen any unconditional promise in writing by the Metropolitan Life Insurance Company to take this mortgage.

Cross-examination.

(Mr. LANGHORNE.)

I went to New York in September, 1919, with Mr. Larson in connection with this loan, this temporary loan. I understood that negotiations had been entered into with the Metropolitan Life Insurance Company for this $600,000 loan at that time, but I had no personal knowledge of it at all. I first

(Testimony of Geo. G. Williamson.)

learned about that from a telegram sent by Mr. Larson to the bank. I left New York and came home before Larson. At the time I was in New York Mr. Simpson and Mr. Webber were, understood, representing Strauss & Co., to lend the bank building company a million dollars on this property here, which contract was given me for examination, and I told the gentlemen who were representing the interests here that it was an unconscionable thing and nobody would enter into it, it called for a 10% commission to begin with and had every other conceivable hardship that could be put into a contract. Mr. Simpson was connected up with that matter. I understood he was the man that was negotiating it; he is the mortgagee in the $600,000 mortgage which was subsequently given. I first learned that the Building Company was to give Simpson a mortgage for $600,000 at Mr. Oldham's office in Seattle, this must have been some time in November, 1919. The mortgage was also prepared in Seattle at the office of Bausman & Oldham by Mr. Oldham. I look it over and examined it after it was prepared. [757] I never agreed personally or individually to give the Metropolitan Life Insurance Company my collateral bond to secure this loan of $600,000. My impression is that the Metropolitan Life only wanted to loan anything within $500,000 on this property and Mr. Simpson represented he could get them up to $600,000 provided the directors of the bank. I never agreed to execute such bond, it was thought of, but I never agreed to it. If that

(Testimony of Geo. G. Williamson.)
letter indicates that the collateral bond of the gentlemen named was to be given to secure the loan until it was reduced to $500,000, that was not my understanding. Thereupon said letter was received in evidence and marked as Exhibit 177, and is as follows:

Exhibit No. 177.

(Flick.)

METROPOLITAN LIFE INSURANCE COMPANY, NEW YORK CITY.

November 7, 1919.

Scandinavian-American Building Company,
Tacoma, Washington.

Dear Sirs:

Subject to approval of title by our Attorneys, and subject also to the approval, in writing, of plans and specifications still to be submitted, and to our being satisfied as to the responsibility of the borrower and collateral bondsmen, our Real Estate Committee has approved your application 9/16/19 for a loan of $600,000 to be made on the bond (or note) of your corporation, and to be secured by first mortgage (or trust deed) covering premises as described in said application, located northeast corner of Pacific and 11th streets, running to an alley, the plot being 75′ on Pacific Street by 120′ on 11th Street.

It is understood, however, that this Company is under no obligation to make said loan, and that no contract for said loan shall be considered made un-

til the execution and delivery by the parties of a building loan agreement in the form in use and approved by this Company, as stated in your said application.

The loan is to be made for a term ending Nov. 1, 1935, and to bear interest at the rate of 6 per cent per annum payable semi-annually on the first days of May and November. Both principal and interest are to be payable at this office, at the par of exchange and net to this Company. [758]

On Nov. 1, 1921, $10,000 is to be paid on account of the principal sum of the loan and the same amount every interest date during the term.

The property is to be improved by a 17-story steel, stone, brick and hollow tile, bank and office building, which is to be built according to plans and specifications still to be submitted to and approved, in writing, by our Architect, Mr. D. E. Waid, No. 1 Madison Avenue, N. Y. City. The building is to be inclosed by August 1, 1920, and completed by Jan. 1, 1921. The building is to be erected in accordance with approved plans and specifications, and the construction is to be subject to the inspection and approval of our Architect. Our Architect is to receive a fee of $3,000 out of the first advance for his services in connection with examination of plans and specifications, inspection of building during its erection, and for certifying to us when a payment is due under the building loan agreement. His necessary traveling and hotel expenses are also to be paid by you.

To guarantee the completion of said building and the removal of any liens which could take priority to our mortgage, we are to receive the Collateral Bond of Messrs. Chas. Drury, J. R. Thompson, George G. Williamson, J. E. Chilberg, Gustav Lindeberg and Jafet Lindeberg. It is understood that these gentlemen are to be individually and collectively bound under obligation until the loan has been reduced to $500,000.

Fire insurance for $850,000, and tornado insurance for $ None (or such amount as may be sufficient to avoid co-insurance) is to be placed under the direction of our Brokers, Dutcher & Edmister Company, No. 1 Liberty Street, New York City, in companies satisfactory to us. The policies must expire on one date, and are to have attached New York Standard Mortgage Clauses, in favor of this Company, not subject to full contribution, and must by the agents be stamped "Paid."

The papers securing the loan are to be in such form as approved by our Attorneys, and are to conform with our usual requirements in regard to real estate loans. The Attorneys are to furnish us with a complete abstract of title, and official searches, if possible, and must certify to us that the title is good and that the mortgage (or deed) securing our loan constitutes a first and valid lien on property, and that there is no possibility of other liens being filed which could take priority to the same.

We must be furnished with official survey of the property in platform, various stages of construc-

tion, showing the title lines and giving measurements of same, and the location of the walls of buildings on the property, with surveyor's certificate that the walls are plumb, that the buildings stands strictly within the title lines, and that there are no encroachments of other buildings on the property.

Any leases made before the completion of our loan, affecting the premises, must by their terms be made subject to our mortgage for the full amount to be advanced thereunder. Contracts entered into for the construction of the building should contain a clause [759] subordinating the contractors' right of lien to the lien of our mortgage.

The fees and disbursements of our Attorneys for examination of title, preparation and recording of papers, U. S. Internal Revenue stamps, etc., are to be paid by you. Please arrange for examination of title and preparation of papers with our Attorneys Mesrs. Bausman & Oldham, Hoge Building, Seattle, Wash.

This letter shall be deemed merely a notice, and shall not be construed as an agreement to make said loan, or as imposing any obligation on this Company to enter into a building loan agreement in respect thereto.

It is understood that the money for this loan is not to be advanced until the building is entirely completed and our Architect can so certify, and our counsel can certify the property is free from liens

(Testimony of Geo. G. Williamson.)

which could affect our mortgage.

Yours truly,

(Signed) WALTER STABLER,

Comptroller.

WS/H.

Cross-examination.

(By Mr. STILES.)

When I went to New York in September, 1919, I did so at the request of Mr. Larson and Mr. Drury of the bank with the understanding that Mr. Thompson who was in New York would be there for the purpose of considering this proposed loan from Strauss & Company, I went there as the bank's attorney. At that time the Scandinavian-American Building Company had not been organized; my recollection is that the articles of incorporation of the Scandinavian-American Building Company were executed late in November. The minute book of the Scandinavian-American Building Company was thereupon admitted in evidence and marked Exhibit #178. Thereupon certified copy of the articles of incorporation of the Building Company, was received in evidence and marked as Exhibit #179 and is as follows:

Exhibit No. 179.

(Flick.)

We, J. E. Chilberg and Gustaf Lindberg, residents and citizens of the United States of America and of the State of [760] Washington, do hereby associate ourselves together for the purpose of form-

ing and becoming a body corporate under the laws of the State of Washington, and in that behalf and to that end we do hereby execute in triplicate, the following Articles of Incorporation:

ARTICLE I.

The name of this corporation shall be Scandinavian-American Building Company.

ARTICLE II.

The objects and purposes for which this corporation is formed, are:

First: To buy, lease, own, hold, mortgage, hypothecate, bargain, sell and in all lawful ways, acquire, dispose of, deal in or with, real, personal or mixed property of each, every and all kind, nature and description, including the bonds, stocks and other paper and evidences of indebtedness of other corporations:

Second: To raze, construct, alter, and or improve or demolish buildings, structures or other appurtenances to real estate:

Third: To borrow money for the purpose of carrying out the objects or any of the objects of this corporation and to issue notes, bonds and other evidences of indebtedness of the company therefore, but shall not issue paper of any kind as a circulating medium.

ARTICLE III.

The amount of the capital stock of this corporation shall be TWO HUNDRED THOUSAND DOLLARS ($200,000.00) divided into two thousand (2000) shares of the par value of ONE HUNDRED DOLLARS ($100.00) per share.

ARTICLE IV.

The business of this corporation shall be managed and controlled by a board of seven trustees and the names and addresses of those who shall be the first trustees thereof and who shall manage the affairs of this corporation until Monday the 1st day of March, 1920, are:

J. E. CHILBERG and O. S. LARSON, Residing at Seattle, Wash. [761]

JAFET LINDEBERG, Residing at San Francisco, California.

GUSTAF LINDBERG, CHARLES DRURY, JAMES R. THOMPSON and GEO. G. WILLIAMSON, Residing at Tacoma, Washington.

ARTICLE V.

The time of the corporate existence of this corporation is and shall be fifty (50) years.

IN WITNESS WHEREOF, we have hereunto set our hands and executed these Articles of Incorporation in triplicate, this 18th day of November, A. D. 1919.

J. E. CHILBERG.
G. LINDBERG.

Acknowledged by Chilberg and Lindberg, November 18, 1919.

Received in Office of Auditor of Pierce County, February 26, 1920.

Gustaf Lindberg, Geo. G. Williamson, Charles Drury, and Jafet Lindeberg, qualified as directors by taking the oath of office. Each of the above directors subscribed for one share of stock of the

(Testimony of Geo. G. Williamson.)

par value of $100.00 each, O. S. Larson subscribed for the balance, $199,600 worth.

Whether these men who subscribed to the capital stock of the building company were directors of the bank would depend upon when this subscription took place. Mr. Drury was, I think, and Mr. Jafet Lindeberg, and if this was before May, 1920, I was. As to Mr. Jafet Lindeberg, I am not sure, and Mr. Larson. I think Mr. Lamborn was a director of the bank beginning 1921, I mean 1920. Thereupon the corporate minute-book of the Scandinavian-American Bank of Tacoma was introduced in evidence as Exhibit #183.

All I know about the financial arrangements for the Building company was that it was represented that the building was financed outside the bank. That statement was made to the Board of Directors of the bank many times. By Mr. Larson and Mr. Drury. I was told and it was represented to the Board that the [762] building was fully financed. That representation was made by Mr. Drury and Mr. Simpson. I understood Mr. Larson and Mr. Drury were acting in conjunction with Mr. Simpson and Mr. Webber in financing the building. Mr. Drury was president of the building company, Mr. Sheldon was secretary and Mr. Ogden was Treasurer. My last conference was with Mr. Oldham and must have been along about the time the note and mortgage were executed, I think that was in February. My understanding was that there was a commitment from the Metropolitan Life, I have never seen any actual contract on which they com-

(Testimony of Geo. G. Williamson.)

mitted themselves, I am telling you what was represented to me at the meeting. I was acting in the capacity of attorney. Mr. Larson had made that representation to the board of directors of the Bank. The Bank owned the two corner lots upon which the building was being erected and deeded them to the building company. Before that time, a deed was secured from Mr. Drury to the third adjoining lot. I am not sure whether that deed ran to the bank or to the building company. I learned afterwards that the bank did pay for it. The bank deeded the two corner lots to the building company, and Mr. Drury deeded the adjoining lot to the building company, but the bank paid for it. At that time the purpose of deeding this property to the building company was spread upon the books of the bank at the board meeting. It was understood that the bank was going to occupy that building when it was completed. There was a good deal of talk about the bank having a twenty or twenty-five year lease on the ground floor and basement and second floor of the building when completed. There was no lease made that I know anything about. I know absolutely nothing about the purchase of that stock of the building company until January, 1921, directly or indirectly. I think the records show that there were two trustees meetings [763] of the building company. I do not recall being present at but one of them. I had no notice of a special meeting whereby I was apprised of the fact that the bank was buying the stock of the

(Testimony of Geo. G. Williamson.)
building company. I did not know a thing in the world about it directly or indirectly. I know it is a fact, yes, know it from the Bank Commissioner, and I know it from other sources, but I knew nothing about it at all during that time. I learned it in this way. They came in and asked me to endorse my one share of stock over. I endorsed it over and at that time—I never knew prior to that time the bank had advanced a dollar on account of that stock. During the time that I was a trustee of the bank there was absolutely no suggestion ever made that the bank would advance the $600,000 when that money was obtained from the Metropolitan Life. It was understood by everybody concerned that the Metropolitan Life Insurance Company was submitted to a loan of $600,000 on that property.

Cross-examination.

(By Mr. OAKLEY.)

The matter of the application to the Metropolitan Life Insurance Company for a loan of $600,000 was discussed there in New York just before I left. The matter of the loan from Strauss & Company was entirely abandoned before I left. When I left New York there was an understanding that Mr. Simpson, Mr. Webber, and Mr. Larson were in negotiation with Mr. Stabler who had charge of the loans of the Metropolitan Life Insurance Company, a controller or chairman of the loan committee of the Company. After I came back to Tacoma I was directed or requested as Attorney for the

(Testimony of Geo. G. Williamson.)

bank to go to Mr. Oldham's office in Seattle, the firm of Bausman & Oldham, to see him as attorney for the Metropolitan Life with a view to getting those notes and mortgages [764] in shape acceptable to Mr. Oldham as attorney for the Metropolitan Life Insurance Company. At that first meeting Mr. Simpson was present and Mr. J. E. Chilberg and Mr. O. S. Larson. Mr. Oldham submitted a form of note and a form of mortgage such as the Metropolitan Life would accept. I suggested that since he had passed upon it, that he prepare the mortgage note and resolution. They were prepared in his office and sent over here and submitted. The abstract of the property was prepared, brought down to date and turned over to Mr. Oldham. Subsequently he gave us his written opinion on it and thereafter passed the title as merchantable. The matter came up as to the time of filing this mortgage and he said the Metropolitan would insist upon the whole thing if they were going to carry out their contract to make this loan, and that they insisted that the mortgage go on record before any work was done, and we discussed the question of whether or not a lien would lie for the rest of the building there, and that matter was looked into and he concluded that no lien would lie for that, and he said when the mortgage was ready and executed he would come over here and see that it was placed on record before any work was done on the premise. One day he and Mr. Drury came into our office and Mr. Drury and

(Testimony of Geo. G. Williamson.)

Mr. Oldham later were up to look at the premises to see if any work had been done, and afterwards instructed that the mortgage be filed and that was done that day and Mr. Oldham requested me to notify him when it was filed, and a letter was written from our office notifying him of the filing of it later. The witness thereupon identified the mortgage referred to and said mortgage was thereupon offered in evidence as Exhibit #180; a true and correct copy of said mortgage is made a part of the answer and cross-complaint filed herein by J. P. Duke, as supervisor of banking of the State of Washington. [765]

Said Exhibit #180 is as follows:

Receiver's Exhibit No. 180.

Scandinavian-American Building Company, a corporation organized under the laws of the State of Washington, with its principal place of business at Tacoma, Washington (hereinafter called the Mortgagor), mortgages to G. Wallace Simpson, of Philadelphia, Pennsylvania (hereinafter called the Mortgagee), the following described real estate situated in Pierce County, State of Washington, particularly described as follows:

All of Lots Ten (10), Eleven (11), and Twelve (12), in Block One Thousand Three (1003), as the same are known and designated upon that certain plat entitled "Map of New Tacoma, Washington, Territory," which was filed for record in the office of the Auditor of Pierce County, Washington, on

February 3, 1875, said property being otherwise described as follows:

Beginning at a point where the northerly marginal line of South Eleventh Street in the city of Tacoma intersects the easterly marginal line of Pacific Avenue; thence northerly along said easterly marginal line of Pacific Avenue a distance of 74,941 feet to the intersection of said easterly marginal line with the northerly marginal line of said Lot Ten (10); then easterly along said northerly marginal line of said Lot Ten (10) a distance of 119,893 feet to a point where said northerly marginal line of Lot Ten intersects the westerly marginal line of Court "A" (said Court "A" being the alley between the aforesaid Block 1003 and Block 1002 in said addition); thence southerly along said westerly marginal line of said Court "A" a distance of 74,941 feet to a point where said westerly marginal line of Court "A" intersects the northerly marginal line of South Eleventh Street; thence westerly along said northerly marginal line of South Eleventh Street a distance of 119,890 feet to the point of beginning;

TOGETHER with all the buildings now erected or that may hereafter be erected thereon.

TOGETHER with all and singular the privileges, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining; to secure the payment in United States Gold Coin of the present standard of weight and fineness of the principal sum of Six Hundred Thousand Dollars ($600,000.00), according to the terms and conditions

of one certain promissory note executed by the mortgagor to the mortgagee, of even date herewith, which said note is in words and figures as follows: [766]

$600,000.00 March 10th, 1920.

For value received, without grace, I promise to pay to the order of G. Wallace Simpson, of Philadelphia, Pennsylvania, the principal sum of Six Hundred Thousand Dollars ($600,000), with interest thereon from date hereof at the rate of six per cent, (6%) per annum, until maturity, payable semiannually on the first days of May and November of each and every year. Said principal sum shall be paid as follows:

Ten Thousand Dollars on November 1, 1921;
Ten Thousand Dollars on May 1, 1922;
Ten Thousand Dollars on November 1, 1922;
Ten Thousand Dollars on May 1, 1923;
Ten Thousand Dollars on November 1, 1923;
Ten Thousand Dollars on May 1, 1924;
Ten Thousand Dollars on November 1, 1924;
Ten Thousand Dollars on May 1, 1925;
Ten Thousand Dollars on November 1, 1925;
Ten Thousand Dollars on May 1, 1926;
Ten Thousand Dollars on November 1, 1926;
Ten Thousand Dollars on May 1, 1927;
Ten Thousand Dollars on November 1, 1927;
Ten Thousand Dollars on May 1, 1928;
Ten Thousand Dollars on November 1, 1928;
Ten Thousand Dollars on May 1, 1929;
Ten Thousand Dollars on November 1, 1929;
Ten Thousand Dollars on May 1, 1930;
Ten Thousand Dollars on November 1, 1930;

Ten Thousand Dollars on May 1, 1931;
Ten Thousand Dollars on November 1, 1931;
Ten Thousand Dollars on May 1, 1932;
Ten Thousand Dollars on November 1, 1932;
Ten Thousand Dollars on May 1, 1933;
Ten Thousand Dollars on November 1, 1933;
Ten Thousand Dollars on May 1, 1934;
Ten Thousand Dollars on November 1, 1934;
Ten Thousand Dollars on May 1, 1935;
and the balance of said principal sum, to wit, three hundred twenty thousand dollars ($320,000), on November 1, 1935. Said principal sum shall bear interest from maturity until paid at the rate of twelve per cent per annum. Said principal sum and interest shall be paid in United States Gold Coin of the present standard of weight and fineness, at the office of Metropolitan Life Insurance Company in New York, N. Y.

This note with interest is secured by a first mortgage of even date herewith, executed and delivered by the maker hereof to said G. Wallace Simpson, conveying certain real estate described therein, in Pierce County, State of Washington, the terms whereof are made a part hereof.

It is hereby agreed that if default be made in the payment of this note or any part thereof, or any interest thereon, or if failure be made to perform any of the covenants or agreements contained in said mortgage securing this note, then, at the option of the holder of the same, the principal sum, with accrued interest, shall at once become due and collectible, without notice, time being of the essence of

this contract, and said principal sum shall bear interest from such default until paid at the rate of twelve per cent per annum. [767]

In case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in such suit. I consent to a personal deficiency judgment on the above debt, with the intent that the same may be paid in full, irrespective of the security given therefor.

This contract is to be construed in all respects and enforced according to the laws of the State of Washington

SCANDINAVIAN AMERICAN BUILDING COMPANY,
By CHARLES DRURY,
Its President.
And by J. V. SHELDON,
Its Secretary.

AND THE MORTGAGOR hereby covenants and agrees with the mortgagee as follows:

FIRST. The mortgagor is lawfully seized of the premises aforesaid and the same are free and clear of all encumbrances of every nature and kind whatsoever, and the mortgagor will forever warrant and defend the same, with the appurtenances, unto the said mortgagee against the lawful claims and demands of all persons whomsoever. The mortgagor will pay all taxes assessed against said premises or against this mortgage.

SECOND. The mortgagor consents to a personal deficiency judgment for the debt hereby secured, to

the intent that said debt may be paid in full, irrespective of this security; and in the event of suit brought upon this note or mortgage, the mortgagor agrees to pay such sum as the court shall consider reasonable as attorney's fees and costs.

THIRD. Whenever the singular or plural number is used herein, it shall equally include the other, and every mention herein of mortgagor or mortgagee shall include the heirs, executors, administrators, successors and assigns of the party or parties so designated.

FOURTH. All gas and electric fixtures, radiators, heaters, engines and machinery, boilers, ranges, elevators, motors, bath-tubs, sinks, water-closets, basins, pipes, faucets, and other [768] plumbing and heating fixtures, mirrors, mantels, refrigerating plant and ice-boxes, cooking apparatus and appurtenances, and such other goods and chattels and personal property as are ever furnished by a landlord, in letting or operating an unfurnished building similar to the one herein described and referred to, and which are or shall be attached to said building or buildings by nails, screws, bolts, pipe connections, masonry, or in any other manner, and any building which may be erected during the life of this mortgage upon the land covered hereby, are and shall be deemed to be fixtures and an accession to the freehold and a part of the realty, as between the parties hereto and all persons claiming by, through, or under them, and shall be deemed to be a portion of the security for the indebtedness herein mentioned and be covered by this mortgage.

FIFTH. The mortgagee shall be at liberty, immediately after any default in the payment of the principal of said note or of any installment thereof, or of the interest which shall accrue thereon, or of any tax, assessment, water rate, municipal light or heat rate or charge, or premium of fire insurance, or of any part of either at the respective time therein specified for the payment thereof, upon a complaint filed or any other proper legal proceeding being commenced for the foreclosure of this mortgage, to apply for, and the said mortgagee shall be entitled, as a matter of right, without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee herein or of the solvency of any person or persons obligated for the payment of such amounts, to the appointment by any court or tribunal, without notice to any party, of a receiver of the rents, issues and profits of the said premises, with power to lease said premises, or such part thereof as may not then be [769] under lease, and with such other powers as may be deemed necessary, who, after deducting all proper charges and expense attending the execution of said trust as receiver, shall apply the residue of said rents and profits to the payment and satisfaction of the amount remaining secured hereby, or to any deficiency which may exist after applying the proceeds of the sale of said premises to the payment of the amount due, including interest and the costs of foreclosure and sale; and the said rents and profits are hereby, in the event of any default or defaults in the payment of said principal, or interest, or of any

tax, assessment, water rate, municipal light or heat rate or charge, or insurance, pledged and assigned to the *mortgages*, who shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises and to let the said premises, and to receive the rents, issues, and profits thereof, and apply the same, after payment of all necessary charges and expense, on account of the amount hereby secured.

SIXTH. The whole of said principal sum shall become due at the option of the mortgagee after default in the payment of interest for thirty days, or after default in the payment of any tax, assessment, water rate, municipal light or heat rate or charge for sixty days after the same shall become due and payable, or after default in the payment of any installment herein mentioned, or immediately upon the actual or threatened demolition or removal of any building erected on said premises.

SEVENTH. The whole of said principal sum and interest shall become due at the option of the mortgagee upon failure of any owner of the above described premises to comply with the requirements of any department of the City of Tacoma within thirty days after notice of such requirement shall have been given to the then [770] owner of said premises by the mortgagee.

EIGHTH. If default be made in the payment of the indebtedness as herein provided or of any part thereof, the mortgagee shall have the power to sell the premises herein described, according to law;

said premises may be sold in one parcel, any provision of law to the contrary notwithstanding.

NINTH. The mortgagor will keep the building on said premises insured against loss by fire in the sum of at least eight hundred fifty thousand dollars ($850,000.00), in such manner, terms, and in such companies and for such amounts as may be satisfactory to the mortgagee, until the debt hereby secured is fully paid, and will keep such policies constantly assigned to the mortgagee, and deliver renewals thereof to Metropolitan Life Insurance Company, at its home office in New York seven days in advance of the expiration of the same, stamped "PAID" by the agent or company issuing the same. Said policies and renewals thereof shall contain the New York standard mortgagee clause, with full contribution clause eliminated. All of said policies shall be written to expire on one and the same date. In the event the mortgagor shall for any reason fail to keep said premises so insured, or shall fail to deliver the policies of insurance or renewals thereof to Metropolitan Life Insurance Company, as aforesaid, or shall fail to pay the premiums thereon, the mortgagee, if he so elects, may have such insurance written and pay the premiums thereon, and any premiums so paid shall be secured by this mortgage and repaid by the mortgagor within ten days after payment thereof by the mortgagee. In default thereof the whole principal sum and interest and insurance premiums, with interest on such sums paid for such insurance from the date of payment, may be and shall become due at the election of the mort-

gagee, anything herein to [771] the contrary notwithstanding.

TENTH. Should the mortgagee, by reason of any such insurance against loss by fire as aforesaid, receive any sum or sums of money for any damage by fire to the said building or buildings such amount may be retained and applied by it toward payment of the amount hereby secured; or the same may be paid over, either wholly or in part, to the mortgagor, to enable the mortgagor to repair said buildings or to erect new buildings in their place, or for any other purpose or object satisfactory to the mortgagee, without affecting the lien of this mortgage for the full amount secured thereby before such damage by fire, or such payment over, took place.

ELEVENTH. The mailing of a written notice and demand, by depositing it in any postoffice, station or letter-box, enclosed in a postpaid envelope, addressed to the owner of record of said mortgaged premises and directed to said owner at the last address actually furnished to the holder of this mortgage, or, in default thereof, directed to said owner at said mortgaged premises, shall be sufficient notice and demand in any case arising under this instrument, and required by the provisions thereof or the requirements of law.

TWELFTH. In default of the payment by mortgagor of all or any taxes, charges, and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, or against this mortgage, it shall and may be lawful for the said mortgagee to pay the amount of any such tax,

charge, or assessment, with any expenses attending the same; and any amount so paid, the mortgagor shall repay to the mortgagee, on demand, with interest thereon, and the same shall be a lien on the said premises and be secured by the said note and by these presents; and the whole [772] amount hereby secured, if not then due, shall thereupon, if the said mortgagee so elects, become due and payable forthwith.

THIRTEENTH. And it is further mutually covenanted and agreed that in the event of the passage, after the date of this mortgage, of any law of the State of Washington, deducting from the value of land for the purposes of taxation any lien thereon, or changing in any way the laws now in force for the taxation of mortgages or debts secured by mortgage for State of local purposes, or the manner of the collection of any such taxes, so as to affect this mortgage, or the note hereby secured, the whole of the principal sum secured by this mortgage, together with the interest due thereon, shall, at the option of the mortgagee, without notice to any party, become immediately due and payable.

IN WITNESS WHEREOF, the mortgagor has hereunto set its hand and affixed its corporate seal, by its officers thereunto duly authorized, this 10th day of March, 1920.

SCANDINAVIAN AMERICAN BUILDING COMPANY,

By CHARLES DRURY,
Its President.

(Seal) Attest: J. V. SHELDON,
Its Secretary.

State of Washington,
County of Pierce,—ss.

THIS IS TO CERTIFY that on this 10th day of March, 1920, before me, a Notary Public in and for the State of Washington, personally appeared Charles Drury and J. V. Sheldon, to me known to be the president and secretary respectively of Scandinavian-American Building Company, the corporation which executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed [773] of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal the day and year first above written.

(Seal) E. F. FREEMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Attached to Exhibit #180 is the assignment of said mortgage, being Exhibit #180½, to the Scandinavian American Bank of Tacoma, and introduced in evidence as Exhibit #180½, and is as follows:

Exhibit No. 180½.

ASSIGNMENT OF MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS, That G. Wallace Simpson of Philadelphia, Pa., the within named *Mortgage,* in consideration of the sum

of One Dollar ($1), and other valuable considerations, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer, set-over and convey unto the SCANDINAVIAN-AMERICAN BANK OF TACOMA, of Tacoma, Washington, and its assigns, the within mortgage deed, the real estate conveyed, and the promissory note, debts and claims thereby secured, and covenants therein contained.

TO HAVE AND TO HOLD the same Forever, subject nevertheless, to the conditions therein set forth.

IN WITNESS WHEREOF, the said Mortgagee has hereunto set [774] his hand and seal this 7th day of October, A. D. 1920.

G. WALLACE SIMPSON. (Seal)

State of Illinois,
County of Cook,—ss.

I, John A. Bussian, a notary public in and for said county, in the State aforesaid, do hereby certify that G. Wallace Simpson, personally known to me to be the same person, whose name subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 7th day of October, A. D. 1920.

(Seal) JOHN A. BUSSIAN,
Notary Public, Cook County, Illinois.

My commission expires September 5, 1922.

Exhibit #180 shows that it was filed in the Office of the Auditor of Pierce County, Washington, March 10, 1920, by the Scandinavian-American Bank and recorded in mortgage record #225 at page $320. Fee No. 553364.

Exhibit #180½ shows that the assignment of the said mortgage was filed by Guy E. Kelly on January 21, 1921 and recorded in mortgage record #229 at page #248, in the office of the Auditor of Pierce County, Washington. Fee No. 585653.

The mortgage Exhibit #180 was acknowledged before E. F. [775] Freeman, who was Mr. Williamson's law partner.

The minute-book of the Scandinavian-American Bank, pages #417 to #421, was introduced in evidence as Exhibit #181 and is as follows:

Exhibit No. 181.

MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF THE SCANDINAVIAN AMERICAN BANK OF TACOMA.

Held on Tuesday, February 10th, 1920, at 3:30 o'clock P. M.

The Board of Directors of Scandinavian-American Bank of Tacoma met in the Argonne Building, pursuant to call on Tuesday, February 10, 1920, at 3:30 o'clock P. M.

Directors present: Charles Drury, Frank Lamborn, Dean Johnson, Gustaf Lindberg, O. S. Larson, George G. Williamson and M. M. Ogden.

Mr. Drury presided and called the meeting to order and a quorum being present, the following business was transacted:

The Board next considered the matter of the transfer of the property owned by the Bank, being its former site and described as:

Lots 11 and 12, in Block 1003,
"Map of New Tacoma, W. T."

to the Scandinavian American Building Company. This property being encumbered with a mortgage in the principal sum of $70,000, and the Scandinavian American Building Company having acquired lot 10 adjoining, proposes to erect a sixteen-story office building upon the three lots and for the purpose of financing the erection of said building, proposes to borrow $600,000, and execute therefor a first mortgage upon said premises and in addition thereto to issue second mortgage bonds against said premises in the principal sum of $750,000, bearing interest at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years and in order to make the proper financial arrangements, it will be necessary that the title to said premises be vested in said Scandinavian American Building Company and the first mortgage placed against said premises before any work or construction of the building shall commence and before any contract shall have been let for the erection or construction of said building, and the Scandinavian American Building Company agreed to execute to the bank a temporary agreement or certificate, by the terms of which it agrees to execute and deliver to this bank,

second mortgage bonds of the par or face value of $350,000 in payment for [776] said premises, such bond issue to be for not in excess of $750,000, bearing interest at 6 per cent per annum, payable semi-annually and to run for a period of fifteen (15) years and to contain a provision to the effect that the income from said bonds shall, up to two (2%) per cent of the par value of such bonds, be tax free. After discussion, the following resolution was offered and its adoption was moved by Mr. Larson, seconded by Mr. Lindberg and carried, to wit:

WHEREAS, the SCANDINAVIAN AMERICAN BANK OF TACOMA is the owner of lots 11 and 12 in block 1003, in "Map of New Tacoma, W. T." situated in Pierce County, Washington, which property is at the present time encumbered by a mortgage in the principal sum of $70,000, and

WHEREAS, SCANDINAVIAN AMERICAN BUILDING COMPANY, a corporation, organized under the laws of the State of Washington, has proposed to purchase said property for the consideration of $350,000 and proposes to erect upon said premises and lot 10 adjoining, a modern office building of approximately sixteen stories in height and to provide the ground floor thereof with space and accommodations for a Metropolitan banking institution, which space shall be reserved for the use of this bank upon a rental to be agreed upon, and

WHEREAS, for the purpose of financing the construction and erection of said building, the following arrangement has been entered into by said

SCANDINAVIAN AMERICAN BUILDING COMPANY, to wit:

A first mortgage for the principal sum of $600,000, to be executed by said SCANDINAVIAN AMERICAN BUILDING COMPANY, upon all three lots, which said mortgage must be executed and recorded before actual construction shall begin and before any contract for such construction shall have been let and a series of second mortgage bonds of the total par value of $750,000, to be executed and secured by a second mortgage on said premises, which said bonds shall run for a period of fifteen (15) years and bear interest at 6 per cent per annum, payable semi-annually and contain a covenant exempting the income thereof equal to 2 per cent of the total par value of said bonds exempt from taxation by the Federal Income Tax Laws, and

WHEREAS, said SCANDINAVIAN AMERICAN BUILDING COMPANY cannot execute said first mortgage or said second mortgage and the bonds to be secured thereby until it shall first have acquired title to said premises, and

WHEREAS, said SCANDINAVIAN AMERICAN BUILDING COMPANY has agreed to execute and deliver to SCANDINAVIAN AMERICAN BANK OF TACOMA second mortgage bonds hereinbefore referred to of the par value of $350,000 in payment for said real estate as soon as the same can expediently be prepared and be a second mortgage lien upon said premises, and

WHEREAS, temporarily, said SCANDINAVIAN AMERICAN BUILDING COMPANY will execute a certificate or agreement agreeing to so deliver said bonds as soon as the same can be executed as above provided, [777]

NOW, THEREFORE, BE IT RESOLVED, that the President and Cashier of SCANDINAVIAN-AMERICAN BANK OF TACOMA be and they are hereby authorized, directed and empowered to execute and deliver to said SCANDINAVIAN-AMERICAN BUILDING COMPANY a warranty deed of conveyance to said lots 11 and 12, in block 1003, "Map of New Tacoma, W. T." upon receiving from said SCANDINAVIAN-AMERICAN BUILDING COMPANY a certificate or agreement agreeing to deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA, within four (4) months from the date hereof, bonds of the par value of $350,000, bearing interest at 6 per cent. per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T."

It being expressly understood and agreed that the total par value of all of said second mortgage bonds shall not exceed the sum of $750,000.00.

The Directors next discussed the advisability of holding meetings of the Board at regular intervals and it was moved, seconded and carried that regular meetings of the Board shall hereafter be

(Testimony of Geo. G. Williamson.)

held on the second and fourth Wednesday in each month.

There being no further business, the meeting on motion, adjourned.

CHARLES DRURY,
Chairman.

Attest: M. M. OGDEN,
Secretary. [778]

Mr. Simpson absolutely represented that he had arranged to raise the money on this mortgage. That representation was made absolutely, the money was to be paid on the completion of the building. At the first that was the talk, but later I heard that they had changed their position in that respect.

Exhibit #182 is the declaration of trust signed by G. Wallace Simpson, which I think I remember that this was prepared by me. Said exhibit is as follows:

Receiver's Exhibit No. 182.

DECLARATION OF TRUST.

I, G. WALLACE SIMPSON, of Philadelphia, Pennsylvania, do hereby certify and declare as follows, to wit:

That I am the person named as mortgagee in that certain mortgage executed by the SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation organized under the laws of the state of Washington, to secure the payment of $600,000.00 according to the terms and conditions of one certain promissory note which said note is set forth in full

in said mortgage; both said note and mortgage being dated March 10, 1920, and filed for record in the Auditor's office of Pierce County, Washington, on March 10, 1920 and recorded in Volume 225 of Mortgage Records at page 320;

That said mortgage was made to me in trust for the use and benefit of the SCANDINAVIAN-AMERICAN BUILDING COMPANY and all sums of money derived therefrom or hereafter to be derived therefrom constitute a trust fund in my hands belonging to said SCANDINAVIAN-AMERICAN BUILDING COMPANY to be paid to it for its use and benefit, and

I DO HEREBY FURTHER CERTIFY AND DECLARE that I have no interest in said note and mortgage other than as trustee for the said SCANDINAVIAN-AMERICAN BUILDING COMPANY, the said note and mortgage having been made to me as a matter of convenience and to enable me to raise funds for the SCANDINAVIAN-AMERICAN BUILDING COMPANY for the purpose of enabling it to erect a building upon the premises described in said mortgage. [779]

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of August, 1920.

G. WALLACE SIMPSON.

State of Washington,
County of Pierce,—ss.

I, the undersigned, a Notary Public in and for the said State, do hereby certify that on the 17th day of August, 1920, personally appeared before me G. Wallace Simpson, to me known to be the

individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned,

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] M. M. OGDEN,

Notary Public in and for the State of Washington, Residing at Tacoma.

The following extracts are from the minute-book of the bank and part of Exhibit No. 183:

NOW, THEREFORE, BE IT RESOLVED, that the President and Cashier of the SCANDINAVIAN-AMERICAN BANK OF TACOMA be and they hereby are authorized, directed and empowered to execute and deliver to said SCANDINAVIAN-AMERICAN BUILDING COMPANY, a warranty deed of conveyance to said lots 11 and 12, in Block 1103, "Map of New Tacoma, W. T.," upon receiving from said SCANDINAVIAN AMERICAN BUILDING COMPANY a certificate or agreement agreeing to deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA within four (4) months from the date hereof, bonds of the par value of $350,000, bearing interest at 6 per cent [780] per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as

Lots 10, 11 and 12, in block 1003,
"Map of New Tacoma, W. T."

It being expressly understood and agreed that the total par value of all of said second mortgage bonds shall not exceed the sum of $750,000.00.

* * * * * * * * *

There being no further business, the meeting on motion, adjourned.

CHARLES DRURY,
Chairman.

Attest: M. M. OGDEN,
Secretary.

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF THE SCANDINAVIAN-AMERICAN BANK,

Held on Friday, April 9th, at 3:30 o'clock, P. M.

The Board of Directors of the Scandinavian-American Bank of Tacoma met in the Argonne Building, on Friday, April 9th, 1920, at 3:30 P. M.

The following were present: Charles Drury, Dean Johnson, G. Lindberg, Frank Lamborn, J. V. Sheldon, and M. M. Ogden.

Mr. Drury presided and called the meeting to order, the following business being transacted:

It was moved by Mr. Johnson, seconded by Mr. Lindberg, and carried, that a loan of $25,000.00 to the Scandinavian-American Building Company, be authorized.

[781]

* * * * * * * * *

There being no further business, the meeting adjourned.

CHARLES DRURY,
Chairman.

Attest: M. M. OGDEN,
Secretary.

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS OF SCANDINAVIAN-AMERICAN BANK,

Held on Friday, May 7th, 1920, at 3:30 P. M.

The Board of Directors of the Scandinavian-American Bank of Tacoma met in the Argonne Building, on Friday, May 7th, 1920, at 3:30 P. M.

The following were present: Charles Drury, O. S. Larson, Dean Johnson, George G. Williamson, J. V. Sheldon, and M. M. Ogden.

Mr. Drury presided and called the meeting to order, the following business being transacted:

* * * * * * * * *

On motion, an addition credit of $25,000.00 to the Scandinavian-American Building Company was approved.

There being no further business, the meeting adjourned.

CHARLES DRURY,
Chairman.

Attest: M. M. OGDEN,
Secretary.

Mr. STILES.—Also in connection with this case I wish to call upon counsel for the conveyance from Drury, or whoever it was, to the bank Lot 10, and also for the bank's conveyance to the Building Company of Lots 11 and 12, which I wish to put in evidence, and in addition to that, in connection with our case, we want to show the deposition of (1064) Charles Drury, page 3, and also the deposition of Mr. Taylor, taken by the McClintic-Marshall Company, [782] and let-

ters exhibits 7, 8, 9, 10, 11, 12 and 14 of the exhibits in connection with the testimony of Taylor.

Exhibit No. 183.

(Flick.)

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF THE SCANDINAVIAN-AMERICAN BANK,

Held on Friday, July 23d, 1920, at 3:30 oclock, P. M.

The Board of Directors of the Scandinavian-American Bank of Tacoma met in the Argonne Building, on Friday July 23d, 1920, at 3:30 P. M.

The following were present: Charles Drury, O. S. Larson, G. Lindberg, Frank Lamborn, Dean Johnson, and J. V. Sheldon.

Mr. Drury presided and called the meeting to order and the following business transacted.

The minutes of the Directors' meeting held on May the 28th were read and approved.

The Cashier's report for the periods of from May 26th to June 9th, June 9th to June 23d, June 23d to July 7th, and July 7th to July 22d, were presented and ordered placed on file.

On motion, all new loans and renewals were approved and ratified.

Mr. Larson read the following communication which had been received from Mr. Geo. G. Williamson:

"May 21, 1920.

"M. M. Ogden, Secretary,
Board of Directors,
Scandinavian-American Bank of Tacoma,
City.

Dear Sir:

I enclose herewith my resignation as a Director of the bank and request that you present that same to the Directors at the meeting to be held to-day.

Very truly yours,
(Signed) GEO. G. WILLIAMSON." [783]

"May 21, 1920.

"To the Board of Directors of
Scandinavian-American Bank of Tacoma:

I hereby tender my resignation as a Director of the bank and request that it be accepted immediately.

Yours very truly,
(Signed) GEO. G. WILLIAMSON.

On motion duly made, seconded and carried, Mr. Larson was instructed to write Mr. Williamson regarding the above.

No further action was taken, and the above resignation was not accepted.

* * * * * * * * *

There being no further business, upon motion duly made, seconded and carried the meeting adjourned.

———————,
Chairman.

Attest: J. V. SHELDON,
Acting Secretary.

(Testimony of Geo. G. Williamson.)

This minute-book of the Scandinavian-American Building Company shows that Jafet Lindeberg, Gustaf Lindberg, Charles Drury, and George G. Williamson signed the oath of office. The oath is headed also by the names of J. E. Chilberg and O. S. Larson, I find but four of them qualified.

At the inception of this project it was understood that the building was to cost $750,000; then it was a million and then a million and two or three hundred thousand. The difference between the Simpson mortgage of $600,000, and the cost of the building was to be made up of a second mortgage bond issue. Mr. Freeman, my partner, was instructed to prepare a second mortgage bond issue in the sum of $750,000. Mr. Webber had with him a copy of the mortgage, which was left there at the office and Mr. Stimpson stated at that time and stated to me later and to others that this second [784] mortgage bond issue was provided for and would be—the building company was to give to the bank within four months from the date of these resolutions their second mortgage bonds in the sum of $350,000. That was for the execution of the deed and a consideration for the deed.

Q. They were to get these bonds for the money that they advanced in addition to the money that would be raised on the Simpson mortgage, were they not?

A. This was to be in addition to that?

(Testimony of Geo. G. Williamson.)

Q. Yes? A. Yes.

They represented that they had these bonds placed, or a place for them and the $350,000 of the bonds would retire the obligation of the bank. I learned when Simpson came out here, August, that the Building Company had not received any money on the mortgage. I do not know who else knew it before that. I think it was known before August that the building would cost more than a million dollars. I had a talk with Mr. Simpson about his failure to arrange the $600,000 mortgage loan as he absolutely not only said he would raise it but said he had it placed. He and Mr. Webber stated that the bond issue was placed and when I questioned him in August concerning it, they brought it up, I did not see how a second mortgage bond issue could be floated, and they stated repeatedly that it was done in Philadelphia. It was my understanding that in August, Mr. Simpson had not secured the money on the mortgage and they had not secured money on the bond issue, —and Mr. Simpson said he had an appointment with Mr. Strauss in San Francisco, or Pasadena and was on his way there to see him. He said he had not been able to place the loan. I learned after I resigned that any moneys other than the loan of April 14, 1920, that went into the building came out of the bank right along. [785]

Cross-examination.

(By Mr. OAKLEY.)

I resigned because it had been absolutely rep-

(Testimony of Geo. G. Williamson.)

resented to the Board of Directors of the *Bank was* not going to put a dollar in that building. There had been representations all along made to the board, relied upon by the board, and I do not think there was a man on the board that did not have that belief and firm conviction. The first time it ever came to my knowledge that the bank had advanced a dollar was the time I told you about, and I got out just as quick as I could. All of the representations had been to the contrary, absolutely, every director of the bank can testify to that, and any man that has any knowledge of the subject. I can identify the signature of Mr. Drury and Mr. Sheldon on this paper which you show me marked Exhibit #184. If a concern issued a bond issue of $750,000 and delivers $350,000 of the bond issue to somebody else in payment of a debt, it would leave $400,000. The representations were made by Mr. Simpson and Mr. Webber, that these bonds had been placed and would be sold when executed and duly delivered, and if they were sold before the bank,—before the four months' period was up, before the bonds were delivered to the bank, the bank would be paid in cash. The only object of the building company was to erect this building, and I suppose everybody assumed that they would use the remaining $400,000 whatever funds they had for the purpose of building that building. That was the purpose of issuing the bonds, to get money to complete the building. [786]

The witness then identified Exhibit #184, which is as follows:

Receiver's Exhibit No. 184.

CERTIFICATE AND AGREEMENT.

THIS INDENTURE made this 20th day of February, 1920.

WITNESSETH:

That WHEREAS pursuant to resolution of SCANDINAVIAN-AMERICAN BANK OF TACOMA, adopted at a meeting of the Board of Directors of said [787] SCANDINAVIAN-AMERICAN BANK OF TACOMA on the 10th day of February, 1920, a copy of said resolution being attached hereto and marked Exhibit "A" and by this reference made a part hereof as tho set forth in full herein, the SCANDINAVIAN-AMERICAN BUILDING COMPANY agreed to execute to SCANDINAVIAN-AMERICAN BANK OF TACOMA a certificate to deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA, bonds of the par value of $350,000, bearing interest at 6 per cent per annum, payable semi-annually and secured by a second mortgage upon

> Lots 10, 11 and 12, in Block 1003, "Map of New Tacoma, W. T." situated in Pierce County, Washington,

the total issue of said second mortgage bonds not to exceed the sum of $750,000, and

WHEREAS pursuant to said resolution said SCANDINAVIAN-AMERICAN BANK OF TACOMA has executed and delivered to SCANDI-

NAVIAN-AMERICAN BUILDING COMPANY this day a warranty deed of conveyance to said Lots 11 and 12, described in said resolution.

NOW THEREFORE and for and in consideration of the execution of said deed the undersigned, SCANDINAVIAN-AMERICAN BUILDING COMPANY does hereby agree to execute and deliver to SCANDINAVIAN-AMERICAN BANK OF TACOMA, within a period of four (4) months from the 10th dayof February, 1920, mortgage bonds of the face or par value of $350,000, being a part of a total issue of $750,000; said bonds to bear interest at 6 per cent per annum, payable semi-annually and to contain a tax free covenant with respect to the income thereon as is provided in said resolution and to be secured by a mortgage upon

> Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T." situated in Pierce County, Washington, [788]

and upon the delivery of said bonds this certificate to be returned to the undersigned.

IN WITNESS WHEREOF this certificate is executed by said SCANDINAVIAN-AMERICAN BUILDING COMPANY, by its President and Secretary thereunto duly authorized, this 20th day of February, 1920.

SCANDINAVIAN-AMERICAN BUILDING COMPANY.

By CHARLES DRURY,
President.

By J. V. SHELDON,
Secretary.

EXHIBIT "A."

WHEREAS the SCANDINAVIAN-AMERICAN BANK OF TACOMA is the owner of lots 11 and 12 in block 1003, in "Map of New Tacoma, W. T.," situated in Pierce County, Washington, which property is at the present time encumbered by a mortgage in the principal sum of $70,000 and

WHEREAS SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation, organized under the laws of the State of Washington, has proposed to purchase said property for the consideration of $350,000 and proposes to erect upon said premises and lot 10 adjoining, a modern office building of approximately sixteen stories in height and to provide the ground floor thereof with space accommodations for a metropolitan banking institution, which space shall be reserved for the use of this bank upon a rental to be agreed upon and

WHEREAS for the purpose of financing the construction and erection of said building, the following arrangement has been entered into by said SCANDINAVIAN-AMERICAN BUILDING COMPANY, to wit:

A first mortgage for the principal sum of $600,000 to be executed by said SCANDINAVIAN-AMERICAN BUILDING COMPANY upon all three lots, which said mortgage must be executed and recorded before actual construction shall begin and before any contract for such construction shall have been let and a series of second mortgage bonds of the total par value of $750,000 to be executed and se-

cured by a second mortgage on said premises, which said bonds shall run for a period of fifteen (15) years and bear interest at 6 per cent per annum, payable semi-annually and contain a covenant exempting the income thereof equal to 2 per cent of the total par value of said bonds exempt from taxation by the Federal Income Tax Laws and [789]

WHEREAS said SCANDINAVIAN-AMERICAN BUILDING COMPANY cannot execute said first mortgage or said second mortgage and the bonds to be secured thereby until it shall first have acquired title to said premises and

WHEREAS the SCANDINAVIAN-AMERICAN BUILDING COMPANY has agreed to execute and deliver to SCANDINAVIAN-AMERICAN BANK OF TACOMA, second mortgage bonds hereinbefore referred to of the par value of $350,000 in payment for said real estate as soon as the same can expediently be prepared and be a second mortgage lien upon said premises and

WHEREAS, temporarily, said SCANDINAVIAN-AMERICAN BUILDING COMPANY will execute a certificate or agreement agreeing to so deliver said bonds as soon as the same can be executed as above provided.

NOW, THEREFORE, BE IT RESOLVED that the President and Cashier of SCANDINAVIAN-AMERICAN BANK OF TACOMA be and they hereby are authorized, directed and empowered to execute and deliver to said SCANDINAVIAN-AMERICAN BUILDING COMPANY a warranty

(Testimony of Geo. G. Williamson.)

deed of conveyance to said lots 11 and 12, in block 1003, "Map of New Tacoma, W. T.," upon receiving from said SCANDINAVIAN-AMERICAN BUILDING COMPANY a certificate or agreement agreeing

To deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA, within four (4) months from the date hereof, bonds of the par value of $350,000, bearing interest at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as

> Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T.,"

it being expressly understood and agreed that the total par value of all of said second mortgage bonds shall not exceed the sum of $750,000.

The Directors next discussed the advisability of holding meetings of the board at regular intervals and it was moved, seconded and carried that regular meetings of the Board shall hereafter be held on the second and fourth Wednesday in each month.

There being no further business, the meeting on motion, adjourned.

———————

Attest:———————

Cross-examination.

(By Mr. FLICK.)

I will have to admit that I relied upon the fact that the bonds [790] had been placed as stated

(Testimony of Geo. G. Williamson.)

when I was connected with the Building Company. I was nominally a member of the Board of the Building Company on October 10th, 1920. How should I know by virtue of my office if this assignment was made back from Simpson to the bank? I had absolutely no knowledge of that transaction. At that time I had absolutely severed my connection with the bank in an official capacity. I have already told you that I never heard that Simpson had assigned the mortgage to the bank. Moreover, the building company being the mortgagor and somebody else being the mortgagee, couldn't they assign the mortgage without—without having the mortgage —the assignment from Simpson to the bank was never brought to my attention. I could not see the possible necessity for it. He would have the right to assign it without talking to me or anybody else about it.

Testimony of M. M. Ogden, for Tacoma Millwork Supply Company.

M. M. OGDEN, witness called and sworn on behalf of the Tacoma Millwork and Supply Company, testified as follows:

Direct Examination.

(By Mr. FLICK.)

I was cashier of the Scandinavian-American Bank and the cards constituting exhibit 185 are the record of loans made by the bank to the building company.

(Testimony of M. M. Ogden.)

The first time the $600,000 mortgage appears on the collateral card, or rather as collateral matter, is December 9th, 1920.

Exhibit No. 185.

(FLICK.)

SCANDINAVIAN AMERICAN BLDG. CO.

CHAS. DRURY, Pres.

Date Recd.		No.	Amt.	Rate	Due	Part Date	Pyts. Amt.	Total Liability	Date Final Payt.
Dec. 8, 18		50335	15,000	6				15,000	
						2/3/20	15,000		2/3/20
Apr. 14/20		52076	25,000		D	6/25/20	25,000	25,000	6/25/20
5/21/20		52652	25,000		D	6/25/20	25,000	50,000	6/25/20
		52076							6/25/20
11/8/20		54920	100,000	6		3/8/21	150,000		
11/8/20		1	50,000	6		3/8/21			12/9/20
		20				12/9/20	50,000		12/9/20
		1				12/9/20	100,000		12/9/20
12/9/20	R. E.	232	200,000				200,000		
12/31/20	R. E.	233	9,133.25				209,133.25		

[791]

Exhibit No. 187.

(Flick.)

No. 232. Real Estate Loans. Amount, $200,00. Date Recd. December 9, 1920. Time, D. Date Note, 12/9/20. Int. Rate 6 Due, D. Makers, Scandinavian-American Building Company (memo note), memo of Collaterals, etc. (Over) Back.

(Testimony of M. M. Ogden.)

Note of Scan.-Amer. Bldg. Co. dated 3/10/20 for $600,000 to G. Wallace Simpson, $10,000 due 11/1/21 and like amount every six months to and including May 1, 1935. Balance of $320,-000 due Nov. 1, 1935.

Mtge. from Scandinavian-American Building Company to G. Wallace Simpson covering lots 10 and 11 and 12, Block 1003 Map of New Tacoma, W. T. together with all buildings built or to be built and equipped Mtg. #553364 filed in Pierce County March 10, 1920.

Assignment of mortgage from G. Wallace Simpson to Scandinavian-American Bank of Tacoma.

Two abstracts of above described property #26,-282 and #27155 both compiled by Tacoma Title Company.

So that on the day we collateralized this mortgage so far as the records show, we increased the loan only $50,000.

Q. Now, where does it show anywhere in your records that you paid for this stock?

A. The stock of the Building Company?

Q. Yes. This payment was made June 25, 1920.

A. That is carried under "stocks and bonds."

Q. That is carried under stocks and bonds?

A. Yes.

These cards (exhibits 185 and 187) are our regular liability ledger sheets. I know that some of these loans were before the board and some were not. The loan of December 8th, of $50,000 was not; the one of November 8th, of $100,000 and $50,000 was

(Testimony of M. M. Ogden.)

not; On April 9th, there was an authorization of $25,000 to the Scandinavian-American Building Company. There was present at that meeting directors Charles Drury, Dean Johnson, Gustaf Lindberg, Frank Lamborn, and J. V. Sheldon. Mr. Larson was absent. May 7th, there was an authorization of $25,000 to the Scandinavian-American Building Company. Mr. Larson was not present when the first one [792] was authorized, but was present when the second one was. I could not say whether Mr. Larson took up with the members of the Board or not this matter of advancing money to the building company. It was not at the board meeting I attended. When the assignment of this mortgage was taken over by the bank, that was not done at a board meeting. As to whether the bank paid anything for this assignment, the bank was making advances to the building company. Simpson was the assignor. The bank records do not show any payments to Simpson nor any payment to the Metropolitan Life Insurance Company, or anybody else, except those two advances spoken of for $25,000 and $25,000. Assuming that this assignment was taken October 7th or 8th, up to that time so far as any advances are concerned they comprise two for $25,000 each and one for $15,000, all of which had already been advanced. So that on the day of the assignment the only advance that the bank had was the advance of the stock of the company. I do not know that it is a fact that it was proposed that the bank owned this stock of the building com-

(Testimony of M. M. Ogden.)

pany from the beginning, I never heard Mr. Larson mention that stock.

Q. You knew that the bank purchased the stock of the Building Company; originally made the arrangement to purchase the stock way in the early spring? A. No.

Q. You know they did purchase it June 25, don't you?

A. I didn't know that until long afterwards.

Q. But you did find out that they purchased it on June 25th?

A. Yes, I found out later that the entry went through on June 25th.

Q. Entry on your books, that is your stock and bond account also?

A. Yes, stock and securities. [793]

When the bank closed its doors this stock of the Building Company was listed as an asset and has been carried by the receiver since then, as an asset of the bank. The first I heard of the plan to build this building was in 1919, in the spring of 1919. I do not know who I heard it from. I understood that [794] the Metropolitan Insurance Company would not make any advance on the mortgage until the building was completed. I understood that it was the understanding at first that the mortgage could not be used for an intermediary loan, and then I know negotiations were on with the Metropolitan later to get an advance on the mortgage, and then later on Mr. Larson or some one tried to get them to advance the money toward the intermediary

(Testimony of M. M. Ogden.)

work. I know Mr. Larson went east and came back with the assignment.

"Q. Was he authorized by any board meeting to go east and get this assignment to your knowledge?

A. No records I know of in the board meeting records about this trip."

The bank records show no payment to Mr. Simpson or the insurance company of possible advances to the building company.

The six sheets constituting Exhibit 188 contain all of the transactions in connection with the advances from the bank to the building company. They make a set altogether and none of them hold any recital of collateral except the one of November 9.

Exhibit No. 188.

(Flick.)

Number 233. Real Estate Loans. Amount $9133.25. Date Rec'd, 12/31/20. Time, Demand. Date Check, 12/31/20. Int. Rate, None. Due, Demand. Makers or Payees, Scandinavian-American Building Company (check).

Notation on the Back thereof:

This note represents the carrying as real estate loan #233 the check #1190 of the Scandinavian-American Building Company dated Dec. 31, 1920, payable to the Scandinavian-American Bank for $9,133.25 signed by J. V. Sheldon, Sec'y-Treas., upon which voucher check is the following memo:

Interest on Capital Stock of Scandinavian-American Building Company 6% on $200,000 from June 25, 1920 (Date of entry) to Dec. 31, 1920	$6,300.00
Interest on Drury Lot—6% on $65,000 from September 25, 1920, to Dec. 31, 1920	1,083.25
Interest on Banking House Investment 6% [795] on $350,000.00 from —— to Dec. 31, 1920	1,750.00
	$9,133.25

Attached thereto and written on a letter-head of the Scandinavian-American Bank:

"Enter this voucher up as real estate loan and hold until advance is secured on mortgage, then charge same to the account of the Scandinavian-American Building Company.

(Signed) O. S. LARSON,
President."

No. 50335. Notes and Discounts	Part Pts.		Int. Payts.	
Amt. $15000. Date Rec'd 12/8/19	Date.	Amt.	Date.	Amt.
Time 90. Date Note 12/8/19	2/3./20	$15,000	2/3/20	$167.50
Int. Rate 6 Due 3/7/20				
Scandinavian Am. Bk. Bldg. Co.,				
Chas. Drury, President.				

Memo of Collateral Securities (over) Back.

Opinion of title by Williamson, Williamson & Freeman on Lot 10 Block 1003 Map of New Tacoma.

Release of Mortgage Geo. B. Kandle to John McPhee, Mortgage dated 1/26/16, Page 501, Vol. 197, Pierce County Records.

Warranty Deed from Drury the Tailor, Inc.

(Testimony of M. M. Ogden.)

No. 52076. Part Payments Int. on Payts.
Amt. 25,000 Date Recd. Apr. 14, 20 Date Amt. Date to Amt. 6%
Time D. Date Note 4/10/20 6/25/20 $25,000 6/25/20 $316.67
Date D. Date Paid, June 25, 1920.
Maker or Payers:
Scand. Am. Bldg. Co.
Chas. Drury, Pres.
J. V. Sheldon, Sec.

No. 52652. Part Payts. Int. Payts. Date Pd.
Amt. $25,000 Date Rec. Date Amt. Date Amt. 6%
5/21/20 6/25/20 $25,000 6/25/20 $145.83
6/25/20 to 6/25/20
Maker:
Scandinavian American Building Company.
Charles Drury, President.
J. V. Sheldon, Secretary.

No. 54920 Part Payts. Int. Payts. Date Pd.
Amt. $100,000 Date Recd. Date Amt. Date to Amt.
Time 4 Mo. 11/8/20 Dec. 9/20 $100,000 12/9/20 $516.66
12/9/20 12/9/20
Int. Rate 6% Due 3/8/21
Maker:
Scandinavian American Building Company,
Charles Drury, President.
J. V. Sheldon, Secretary.
[796]

No 54921. Part Payts. Int. Payts. Date Pd.
Date Recd. Date Amt. Date to Amt.
Amt. $50,000 11/8/20 12/9/20 $50,000 Dec. 9/20 $258.33
Time 4 Mo. Date Note
4/8/20 12/9/20 to 12/9/20
Maker:
Scandinavian American Building Company.
Charles Drury, President,
J. V. Sheldon, Secretary.

Sheet No. 233 of Exhibit No. 188 is a record of a loan December 31, 1920, amounting to $9,133.35, to the Scandinavian-American Building Company. The writing on the back of this sheet No. 233 probably will explain the purpose of that loan. This was to pay the interest on all the advances. It includes an interest charge against the building company for that $200,000, paid for the capital stock of the Building Company, Exhibit 187 under date of December 9, 1920, in the amount of $200,000,

(Testimony of M. M. Ogden.)

with endorsement showing collateral in the bank, took up the two outstanding loans of $100,000 and $50,000 Nos. 54920 and 54921 of Exhibit #188. I do not know anything about the reason for taking over the assignment from Simpson.

Redirect Examination.

(By Mr. FLICK.)

At the time the bank received the check for $9,133.35 it did not give back to the building company the certificates for the stock of the building company.

Cross-examination.

(By Mr. STILES.)

The bank records show that at a certain time it acquired these 2000 shares of stock, and all the time and up until now the bank or the Commissioner of Banking has had the stock of the certificates representing it in its or his possession, and they have been listed as an asset by the Bank Commissioner. I explained the fact that the bank, while the owner of that $200,000 capital stock, was charging interest on $200,000. Under the circumstances I see [797] them now that the bank advanced that much money to the building company and naturally was entitled to interest on the investment. The bank record shows that the bank at one time bought the stock and later shows that the bank charged interest on the money it bought the stock with.

Redirect Examination.

(By Mr. FLICK.)

The receiver is still carrying the stock as an asset.

(Testimony of M. M. Ogden.)
The loan sheets show but one item of $200,000 an increase of pre-existing loans, which has nothing to do with the $200,000 stock loan which shows on the ledger under stocks and other securities.

Redirect Examination.

(By Mr. FLICK.)

There is no $200,000 note in connection with the stock transaction. I have made diligent search through the records which would naturally disclose it. I never had any idea that there was such a note and never understood that there was any note for the purchase money of the stock. The notation on the back of the slip to the effect that the $9,133 represented interest on the $200,000 stock transaction is a typewritten memorandum probably caused to be placed there by Mr. Larson.

Exhibit No. 190.

(Flick.)

Tacoma, Wash., June 25, 1920.

GENERAL.

DEBIT.

Account No. 13—STOCKS AND SECURITIES.

Payment in full stock subscription Scandinavian-American Building Co. .. 200,000.00

CONTRA: Credit Scandinavian-American Building Company.

O. K.—O. S. LARSON.

(Rubber stamp)

P June 25 1920 4 [798]

(Ordinary Deposit Slip.)
Deposited by
SCANDINAVIAN-AMERICAN BUILDING CO.
with
SCANDINAVIAN-AMERICAN BANK
OF TACOMA,
Tacoma, Wash., June 25, 1920.
Specify Banks on which checks are drawn and list separately.

GOLD	$............	....
SILVER	....	....
CURRENCY	....	....
CHECKS	200,000.00	....
Payment in full.............	....	....
Capital stock................	....	....
Scand.-American Building Co.	....	....

(Rubber stamp)
P June 15 1920 4 [799]

Testimony of O. S. Larson, for Tacoma Millwork Supply Company.

O. S. LARSON, a witness called and sworn on behalf of the Tacoma Millwork Supply Company, testified as follows:

Direct Examination.

(By Mr. FLICK.)

I was vice-president of the bank from the 25th day of January, 1917, until the 17th day of January, 1920, and then I was elected president and remained as president until the bank was taken over for liquidation. During the years 1919 and

(Testimony of O. S. Larson.)

1920, after its inception, I do not believe I had any direct relation with the building Company. I was one of the directors, I believe. In reference to the arrangements for a Simpson loan of $600,-000, it is correct that I and Mr. Drury made arrangements for the loan with Mr. Simpson. There was a definite, concrete, complete contract with the Metropolitan Life Insurance Company of New York, and to the best of my knowledge and belief it is still in existence. The proposition of this building was conceived in June, 1919. Mr. Chilberg and I went to New York on the 27th of June, that year, for the purpose of getting a larger mortgage loan for the construction of this building, and improvement of this property, and we came in contact with Mr. Simpson. As I remember the correspondence with the Metropolitan Life Insurance Company, the Treasurer and Comptroller of the Company delivered to Mr. Drury and myself a letter, in New York, on the 19th day of September (paper handed witness). That is the letter I have reference to, dates Sept. 19th, 1919, signed by Mr. Stabler in person. I did not reply to it at that time. I was told that they had to go to the Tacoma Real Estate board to make an appraisal of that property and that was done. The latter part of the Exhibit 192 was afterwards waived. Exhibit 193, is the letter I referred to. [800]

Defendant's Exhibit No. 193.

(Flick.)

METROPOLITAN LIFE INSURANCE COMPANY.

New York City, Sept. 19, 1919.

Mr. O. S. Larson, Vice-president,
Scandinavian-American Bank,
Tacoma, Washington.

Dear Sir:

Referring to application for loan made by the Scandinavian-American Building Company of Tacoma, Wash., on property at the northeast corner of Pacific and 11th Streets, your city, the plot being 75′ on Pacific Street by 120′ on 11th Street, running to an alley.

We believe it is proposed to erect on this property a 16-story and basement with pent house, banking and office building to be erected according to plans and specifications still to be submitted to and approved by us.

Subject to satisfactory confirmation of your value of the ground and the cost of the building, we will recommend to our Real Estate Committee a loan on this property of $650,000 at 6% interest to run for 15 years from November 1, 1920. Beginning with Nov. 1, 1921, $10,000 is to be paid on account of the principal sum of the mortgage and the same amount every interest date thereafter. Interest dates are to be May and November first. It is understood that the advance is not to be made until the building is entirely completed according

to approved plans and specifications and certificate to that effect issued by our Architect, and our counsel can certify that the building has been or will be fully paid for at the time our advance is made. In case the loan is made we will require that our Architect, Mr. D. E. Waid be paid a fee of one-half of 1% for his services for the examination of plans and specifications, examination of the building during its erection and certifying to us when it has been entirely completed. In addition, Mr. Waid is to be paid his necessary hotel and traveling expenses.

In case it is necessary for us to pay for an appraisal of the ground, the cost of such appraisal is to be paid by your company.

We must ask you to send us at the earliest possible moment a full set of plans and specifications including framing plans, and we will have our Architect examine them as soon as possible.

We will also arrange for the appraisal of the land and as soon as we have reached a definite conclusion will inform you and have you sign the application.

We are to receive the collateral bonds of Messrs. Charles Drury, J. R. Thompson, George G. Williamson, J. E. Chilberg, Gustav Lindberg, and Jafet Lindeberg, jointly and severally guaranteeing that this loan will be reduced to $500,000.

Yours truly,

WALTER STABLER,

Comptroller. [801]

(Testimony of O. S. Larson.)

I was told that a loan of that size would have to have the approval of the board of directors, over half a million dollars. I was informed that by Mr. Stabler, who is in charge of all their investments. I later received a two-page communication from Mr. Stabler in writing, and a notice from his attorneys in Seattle that the loan had been passed. The letter referred to is exhibit 177, dated November 7th, 1919. I received a telegram dated November 4th, just before I left for Washington, and this letter I found on my desk Christmas eve when I returned to Tacoma on December 24th, said telegram is Exhibit 194.

Exhibit No. 194.

(Flick.)

E112PO 35 NL. 1919 Nov. 4 AM 11 35.

MS New York NY 4,

Scandinavian-American Bank,

Tacoma, Wash.

Real Estate Committee authorized loan Six Hundred Thousand for erection office building northeast corner Pacific and Eleventh Streets subject to approval title by our counsel and to approval plans and specifications by our Architect writing.

WALTER STABLER.

Judge Frank Bausman called me up over the phone from Seattle and said he had received authorization for this loan and wanted me to call, the letter being dated November 12. I may say for the benefit of all that is the only form of author-

(Testimony of O. S. Larson.)
ization that the Metropolitan Life Insurance Company ever issued for any loan that they make. There was never any change made in this Exhibit 177, the authorization of November 7th, 1919, in any written form. I had one conversation with Mr. Stabler in New York, I think it was on the 5th day of April, 1920, in regard to that bond proposition when he agreed to eliminate that feature of it. When we took over this mortgage from Simpson the insurance company had advanced no money on it and at that [802] time I was still a member of the building company as director and was still an officer in the bank as trustee.

Cross-examination.

(By Mr. STILES.)

This enterprise of constructing a building was started in June, 1919. Mr. Drury and Mr. Lindberg and I talked it over with Mr. Chilberg. We were considering whether to improve this property or whether to spend $150,000 and fix up the old building. At that time the bank owned lots 11 and 12 on which there was thirty year old six story frame building with a brick veneer on the outside. I believe the bank bought that property in 1910, and it was there the bank business was carried on. By 1919 the bank had outgrown these quarters and the question of providing more ample quarters for the bank was gone into. Mr. Chilberg and I went east the first time in July.

It was the bank that was contemplating the erection of the building.

(Testimony of O. S. Larson.)

Well, I should say that the bank and its business were the people that were the controlling interest in putting it in. The organization of the building company was for the purpose of limiting liability. We went on and employed Mr. Webber to prepare plans for this building.

Beginning in 1919 Mr. Simpson has secured a contract, and the contract is in the files of the Receiver to-day, from the Great Bond House of S. W. Strauss and Company, for a loan of $900,000 on this property. They would have paid the money over here in the National Bank of Tacoma, and we would have been permitted to check it out on the estimate of the architect, as the building progressed. Mr. Strauss and his chief counsel called at our hotel and left the contract for Mr. Williamson to examine. Mr. Drury, Mr. Thompson, and Mr. Williamson overruled my motions to take that money. I wanted to take it. Their objection to it was that it caried a ten per cent commission, [803] so that on a $900,000 loan we would get $810,000. This was in September, 1919. That proposition was dropped and then we went to the Metropolitan Life Insurance Company and got that letter.

When we came home we thought we had the building proposition in shape to proceed. We had secured Mr. Webber to draft the plans and had the plans for the bank building. Then some time in October or November Articles of Incorporation of the Scandinavian-American Building

(Testimony of O. S. Larson.)

Company were executed. The purpose of the organization of the corporation was to construct the building we had planned for. When Mr. Webber came here with me he and I drove to Olympia and had a talk with the Bank Commissioner of the state, I detailed to him in a general way what the proposition was and he suggested we fix up a corporation in order to limit liability for damage suits, bills and other things on that building. The trustees of the new corporation were all directors of the bank. The idea was that the bank by having its own directors, trustees or directors of the building company, it would control the building company. The legal department of the bank attended to the filing of these Articles of Incorporation in Olympia. The legal department did the work of the bank and the work of preparing of this organization of the building corporation and I presume they paid the corporation fee. I don't think there was any question but what the bank ultimately paid them. Mr. Moore, the Bank Commissioner, suggested the formation of the separate corporation to build the building. That is my signature to the stock subscription of the building company, I subscribed for that stock on behalf of the bank. Those certificates marked Exhibit #195 are all in Mr. Freeman's handwriting, and are the certificates of stock, issued by the Scandinavian-American Building Company. [804]

Defendant's Exhibit No. 195.

(Stiles.)

NO. SCANDINAVIAN-AMERICAN Shares
-ONE- BUILDING COMPANY. 1996

Capital, ...$200,000.00

Incorporated Under the Laws of Washington.

THIS CERTIFIES THAT O. S. LARSON is the owner of Nineteen hundred Ninety-six Shares of the Capital Stock of Scandinavian-American Building Company transferable only on the Books of the Corporation in person or by Attorney on surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF, the duly authorized officers of this Corporation have hereunto subscribed their names and caused the corporate Seal to be hereto affixed, this 25th day of June, A. D. 1920.

CHAS A. DRURY, President. J. V. SHELDON, Secretary.

(Corporate Seal) Endorsed in blank.

Similar certificates issued to:

Charles Drury ....One share
Gustaf Lindberg ....One share.
Jafet Lindeberg ....One share
Geo. G. Williamson ....One share

(Testimony of O. S. Larson.)

No. 6 SCANDINAVIAN-AMERICAN BUILDING COMPANY. Shares 1996.

Capital, ...$200,000.00

Incorporated Under the Laws of Washington.

THIS CERTIFIES THAT SCANDINAVIAN-AMERICAN BANK OF TACOMA is the owner of Nineteen Hundred Ninety-six Shares of the Capital Stock of SCANDINAVIAN-AMERICAN BUILDING CO., transferable only on the Books of the Corporation in person or by Attorney on surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF, the duly authorized officers of this Corporation have hereunto subscribed their names and caused the corporate Seal to be hereto affixed this 25th day of June, A. D. 1920.

CHARLES DRURY, President. J. V. SHELDON, Secretary.

(Corporate Seal) [805]

This is the certificate I endorsed. These certificates were issued at that time. I never saw the certificate issued to the bank on June 25, 1920, before. It seems to me there was some discussion in December between Mr. Freeman and Mr. Drury about the fact that the certificate had never been issued to the bank. When I got my certificate I immediately endorsed it to the bank. Freeman was a member of the firm of Williamson, Williamson & Freeman, and the bank's legal ad-

(Testimony of O. S. Larson.)

visor and counsellor for all the years I was here. I don't know what the other gentlemen whose certificates are for one share each did with them.

They were endorsed and were in the bank.

Direct Examination (Continued).

(By Mr. FLICK.)

When the $600,000 mortgage was arranged for it was understood that would take up the $70,000 *B*enn Mutual Mortgage. I went east to pay that Penn Mutual mortgage myself, but I did not pay the mortgage at the time, and paid the interest constantly all the time on that mortgage. I was in Philadelphia on the 29th of September, 1920, to pay that $70,000 and Mr. Simpson went over to see those people, and I told Mr. Johnson, the president and Mr. Steele, the assistant to the President, and Mr. Homer the Treasurer of the Penn Mutual Life Insurance Company that we needed the money until we could get the money from the Metropolitan Life Insurance Company, and he told me to take the check and send it back to Tacoma, which I did. When I went to Philadelphia I believe, the draft for $70,000 had been mailed ahead of me to Mr. G. Wallace Simpson in Pennsylvania to pay the old mortgage on the bank property at 11th and Pacific. The Scandinavian-American Bank did not carry an account with the Penn Mutual Insurance Company, but they made various payments to the company. The books of the bank show payments made by the

(Testimony of O. S. Larson.)

Scandinavian-American Bank to the Penn Mutual [806] Insurance Company on this mortgage.

Cross-examination.

(By Mr. LANGHORNE.)

This $70,000 Penn Mutual mortgage I understood to be the bank's obligation. The bank got the money on that original mortgage and I made other payments on it. I told Mr. Moore, who was then Bank Commissioner, the plans we had in the making for the improvement of this property, of the necessity of fixing up the old dilapidated bank building that was there. That our directors thought it best to improve this property with a first-class bank and office structure and during the construction of this building and after it was completed it would be necessary to use some of the bank's funds for that purpose. I believe I told him at that time I had been told in New York that twenty-five per cent of the total cost of the building would probably finish it to a point where the building mortgage could be used to finish out the mortgage. At that time I had, or supposed I had, an arrangement made for the $600,000. Mr. Moore told me that the law gave us permission to use thirty per cent of our capital and surplus, and if we had to go beyond that amount we would have to get the permission of the Bank Commissioner. I told him we had arranged to increase the capital surplus to $1,260,-000. He told me the law gave us the right to use 10% of our capital and surplus—at that time

(Testimony of O. S. Larson.)
we had arranged to increase the capital and surplus to $1,200,000.00. This increase was voted on in July, 1919, and filed in the Spring of 1920. The original estimated cost of the building was $860,000. Afterwards it was increased to $1,100,000.00 and then reduced to $40,000. or $50,000.00 on the marble estimate alone. The difference between the $600,000 and the cost was to be made up of second mortgage bonds, the Seattle bank had agreed to take $150,000.00 of these, this bank was to carry the balance, until they could be worked out from the earnings of the building. It is not true that the Scandinavian-American Bank advanced [807] $400,000 on the strength of this $600,000 mortgage and assignment, when this money was advanced there was no thought that the bank would claim under this $600,000 mortgage. The whole proposition was discussed at the board meeting of December 10th. I believe the original mortgage was $125,000 or $130,000. I know it was considerably in excess of $70,000 at the time I came here. Then there were principal payments due on the first day of every September, and those were made either here at Havelock Boyles or we mailed a draft to Philadelphia. That was on the mortgage given by Chilberg and wife, and the bank also made payments of interest due under that mortgage. When I got to Philadelphia, in September, 1920, I did not succeed in raising any money on this $600,000 given Simpson by the bank building company. I saw the officers of the Penn Mutual In-

(Testimony of O. S. Larson.)
surance Company, and they consented to an extension of the Chilberg mortgage for about four months, and I returned the draft to the Scandinavian-American Bank of Tacoma. It was a check, a cashier's check of the Scandinavian-American Bank. While I was in the city of Chicago, I obtained an assignment of the $600,000 mortgage to the bank under the advice of attorneys because Simpson was sick. At the time I commenced the construction of this building and at the time I commenced paying bills, I fully expected to get the money under the Simpson mortgage. As to why I had Simpson make the assignment of the mortgage to the bank; I went to our attorneys in Chicago, and they told me the situation regarding that mortgage and told me to get Simpson over there and they would make an assignment of the mortgage. Mr. Simpson was not in the very best of health and I did not want to get the mortgage tangled up in his estate, and my attorney Albert Fink advised me to get the mortgage. Neither the bank nor I paid Mr. Simpson anything for that assignment. The mortgage was in Mr. Simpson's possession in Philadelphia and was drafted in the name of the Metropolitan Life Insurance Company of New York and we had expected that [808] when the construction of the building was undertaken, to finish it in eight months, and that from $250,000 to $350,000 would put it through all complete without a lot of unpaid bills against it; so that we would have had it com-

(Testimony of O. S. Larson.)

pleted and the architect of the insurance company would have been here to approve it and we would have gotten the $600,000. When we ran into this delay and all that trouble came the mortgage was sent to Philadelphia and Mr. Simpson put it in the Prudential Insurance Company to get a temporary loan of $400,000 on it to go to pay bills that we had never expected to pay until the building was finished. That was the reason we bought the mortgage in, and that was the reason the mortgage was in Philadelphia, and Mr. Simpson's name was inserted in that new mortgage for that purpose. [809]

Cross-examination.

(By Mr. HOLT.)

In reference to the Chilberg Penn Mutual mortgage of $70,000, the bank was to pay that mortgage. Then the building company was to pay $350,000 on the property and the bank was to pay the mortgage that was on it and release it therefrom. The mortgage was due and called and as I told you yesterday they only extended it as a personal favor to me. [810]

Direct Examination (Continued).

(By Mr. FLICK.)

In reference to the $600,000 mortgage, all the directors knew that we could not get the money until their architects would certify that we could complete it or it was completed.

Q. In other words, the bank directors all knew

(Testimony of O. S. Larson.)

that this fund was to be used for the final completion.

A. I suppose they are all going to deny it now, but they certainly knew it then. When we took this assignment from Mr. Simpson we did not give him any commitment that the bank would see to the payment of that $600,000. He knew we would assign it to the Metropolitan Life Insurance Company. He assigned it to us with that full understanding. I have told you that the payee was changed at the request of the attorneys for the insurance company, and then we have a declaration of trust that was read in evidence here yesterday, from Simpson-Oldham (attorney for the insurance company) dictated that trust and Simpson had the mortgage in his safe in Philadelphia. I had been to Newark, New Jersey and asked Mr. Walker to give us six month's extension on this security, and Mr. Walker said they had need of the money, and Mr. Simpson came with me to Chicago and I went to Attorney Fink's office and explained the nature of this proposition. Mr. Fink told me that the word "trustee-in-law" had gotten more people in trouble than anything else, and to make a clean cut deal of it, Mr. Simpson should make an assignment to the bank for all interested parties. [811]

Cross-examination.

(By Mr. OAKLEY.)

As to why we did not carry this $600,000 as an asset of the Scandinavian-American Bank in the bank records and publish it in our written statement

(Testimony of O. S. Larson.)

through the papers; as required by law, it was not an obligation of the Scandinavian-American Bank of Tacoma, and never was at any stage of the game and I was not required to put it in the bank's statement. I did not carry it as an asset of the bank in our published statement, not to my knowledge. The Scandinavian-American Bank was never paid $415,000 for the property that was deeded to the Scandinavian-American Building Company. As to whether or not I was directed by the trustees of the Scandinavian-American Bank to obtain an assignment, to have Simpson reassign this mortgage to the bank for the purpose of securing the bank for the money already advanced and the money that we have been putting up, I will say I never got any such instructions from anybody. There never was on or about the day of this assignment of this mortgage a note executed by the Scandinavian-American Building Company for $363,000 approximately to represent the interest on that $350,000 from February 10th, up until the date of the assignment, that is absolutely untrue.

Witness refused to answer questions as to how the matter of the $600,000 mortgage and the purchase price agreement for the lots were carried on the bank books upon the ground that they might incriminate him.

I had been writing letters at various and frequent intervals and sending telegrams to Mr. Simpson requesting him to use the $600,000 mortgage for the purpose of securing a temporary loan for the con-

(Testimony of O. S. Larson.)
struction of this building. During the summer months of 1919 I had up a proposition with Mr. G. Wallace Simpson with reference to obtaining a $900,000 loan for the construction of this office building. I received [812] telegram Exhibit 199, in the city of Tacoma, on August 5, 1919, and this is a copy of a letter I wrote to Simpson on August 29th, 1919. That was in reference to the Strauss loan.

Receiver's Exhibit No. 199.

August 29, 1919.

Mr. G. Wallace Simpson,
Medical Arts Building,
Philadelphia, Pa.

Dear Mr. Simpson:

After receiving your lengthy telegram of August 24th, I called a number of my associates together and we went to Seattle where we had a long conference with Mr. Chilberg lasting the greater part of the evening. After leaving Mr. Chilberg's apartment, I telegraphed you as follows:

"Think it important that you come here at once. Other attractive propositions pending. Directors not a unit. Chilberg trying to help you. I expect to leave here for New York on September sixth. This matter should be settled before I leave. Think with you on ground that satisfactory solution could be reached. Can you come here immediately so matter can be settled before I leave here on sixth? Larson?"

On the 25th we received your telegram of the 24th reading as follows:

"Have accepted loan on following terms and conditions Stop Nine Hundred Thousand interest six per cent dated October first nineteen nineteen, matures October first nineteen twenty nine discount ten per cent Stop Fifty Thousand to be paid each year beginning at end of second year Stop Bank or Directors to agree to retire one hundred thousand bonds of last maturity within four years from date of loan at once hundred and two Stop Satisfactory guarantee of completion to be given Stop Bonds to be signed by Realty Company Stop Improvements will be fifteen-story steel frame office building of highest type Stop Estimated rental one hundred and seventy five thousand operating expense and taxes fifty-five thousand Stop Bank to furnish safety deposit vault and fixtures Stop Frederick Webber architect Stop As you will see I have increased loan One Hundred Thousand Stop If this is satisfactory wire authority to sign application as lenders will accept my signature for Realty Company."

We have had this telegram under consideration for several days and now beg to confirm to you the following telegram which we have just dispatched:

"Referring your telegram August Twenty-seventh, three members of our Board offer serious objections to your terms claiming discount should be reduced in substantial amount and sinking fund also reduced to Twenty-five Thousand a year. Are you certain building proposed by Webber will produce One Hundred Seventy-five Thousand gross

rentals based upon One Dollar Seventy-five to Two Dollars per square foot. Have you any suggestions to offer? We all [813] recognize importance of speedy action but do not believe deal can be finally consummated until further conference with you in New York on date suggested by you. Can you hold final action in abeyance until that time?"

As stated in this telegram, three members of our Board of Directors are offering very serious objection to the large loan of $900,000.00 unless the equity which the bank would own in the property could be sold outright to the building corporation, so that finally the only interest the bank would have in the property would be a lease on the banking room and the basement for say a period of twenty-five years at an increased rental every five years if desired.

We, of course, do not know on what basis you arrived at a yearly rental of $175,000.00, and if these figures were arrived at on what we talked over in New York, it is certainly very encouraging. I have found out that there will be no trouble to rent this building on a basis of from $1.75 to $1.90 a square foot. Except for the amount of taxes to be paid on the new property, with the building constructed, we believe that the amount of $55,000.00 covering both this item and operating expenses is about right.

The loan you suggested in one of your telegrams from the Metropolitan Life Insurance Company is by far the cheapest proposition, and this fact has gotten into the upper-story of some of these Directors. In addition to that, there is the St. Louis crowd, who had started to work on it without my

knowledge while I was in the east. Behind them is the Black Masonry & Contracting Company of St. Louis and Berlin, Swern & Randall, architects, No. 19, South LaSalle Street, Chicago, Illinois. The St. Louis outfit is offering a loan of $600,000.00, with discount at 5% with a sinking fund of 5%, the interest rate remaining at 6%.

Mr. Williamson, head of the legal firm in Tacoma associated with us for many years, and also one of our Directors, will go east on the 6 to place his son in school. I have planned to go with him, leaving here a week from to-morrow. Would you be able to hold up these $900,000.00 people until we could have a chance to discuss the matter with you in Philadelphia and explain all these phases to you. Mr. Williamson, being one of the chief objectors to the terms of the $900,000 loan, I believe that this matter could be considered by us in Philadelphia and some of the objectionable features adjusted that the matter could be closed promptly while we are there. Personally, I am free to admit that I am in favor of your proposition, and if you can assist me in any method whereby this bank will dispose of this piece of real estate to the building corporation, I am sure we can consummate the deal.

Very sincerely yours,

——————————,

Vice-President.

OSL/B. [814]

(Testimony of O. S. Larson.)

154 PO MY 16 O NL

Fy Philadelphia Pa Aug 24 1919.

O S LARSON

Vice Prest Scan Amer Bank Tacoma Wn.

Have accepted loan on following terms and conditions Stop Nine Hundred Thousand interest six per cent dated October first nineteen nineteen matures October first nineteen twenty nine discount ten per cent Stop Fifty Thousand to be paid each year beginning at end of second year Stop Bank or directors to agree to retire One Hundred Thousand of Bonds of last maturity within Four years from date of loan at once Hundred and two Stop Satisfactory guarantee of completion to be given Stop Bonds to be signed by Realty Company Stop Improvements will be Fifteen story steel frame office building of highest type Stop Estimated rental One Hundred and Seventy Five Thousand operating expense and taxes Fifty Five Thousand Stop Bank to furnish safety deposit vault and fixtures Stop Frederick Webber Architect Stop As you will see I have increased loan One Hundred Thousand Stop If this is satisfactory wire authority to sign application as Lenders will accept my signature for Realty Company.

V. WALLACE SIMPSON.

1133P [815]

Q. Isn't it true that the board of trustees of the Scandinavian-American Bank at the time of this letter, Exhibit 199, was written in August 29th, 1919,

(Testimony of O. S. Larson.)

were objections to the bank putting any money in real estate for bank purposes?

Mr. Chilberg was making very serious objections, because he wanted to get out of the real estate business in Tacoma, and Mr. Williamson was objecting on other grounds. These are the only two that I can think of. Said they would not consider this proposition unless the equity which the bank would own in the property should be the leasing of the banking rooms. I remember Mr. Chilberg was very seriously objecting to it, and that is the reason I wanted Mr. Williamson to go to New York and find out what was in this Strauss contract. The proposition of the Scandinavian-American Bank entering into a long term lease with the Scandinavian-American Building Company was considered by the trustees and agreed to I think. That was one of the principal reasons why the board of directors of the Metropolitan Life Insurance Company wanted to make this large loan, knowing it was to be occupied by a bank that had been in existence for seventeen years and would probably stay here seventeen years more. I have no correspondence to show that, but that all took place down there in New York. They don't promise to loan $600,000 on pure wind. I had not seen Mr. Moore, the bank Commissioner, in August, 1919, I did not see him until October 7th, 1919. I received the letter, Exhibit 202, from Mr. Chilberg.

(Testimony of O. S. Larson.)

Receiver's Exhibit No. 202.

August 6, 1919.

Mr. O. S. Larson,
Vice Pres., Scandinavian-American Bank,
Tacoma, Washington.

Dear Mr. Larson: [816]

I have been thinking over your conversation with Moore last night. I don't think I would worry that fellow any more anyway. His head is certainly thicker than mush.

If you get your building financed and need the extra $150,000, put it on a second mortgage; give us one-half or two-thirds of it here and you carry the balance, and there is no one in the United States to kick unless it would be your stockholders or ours and it is for their interest that we would be doing it.

This would mean on your plan that there would be a first mortgage of $500,000 on the building, a second mortgage of $150,000, and the balance of the cost of building and property—$350,000 or $400,000—to be carried by capital stock. The second mortgage would be good and there is no reason why we should not handle it in that way if we want to. There is certainly no law to prevent.

Very truly yours,
(Signed) J. E. CHILBERG.

I seem to recollect I met Mr. Moore in Mr. Chilberg's office in Seattle one time, it might have been before that letter was written, I remember Mr. Moore was raising the devil about the Spiketon coal mine at that time. That comes to my mind. I

(Testimony of O. S. Larson.)
do not know what that sentence "I do not think I would worry that fellow any more anyway" refers to. In the face of this letter I state that I had the consent of Mr. Moore to go ahead and put the money of this bank into the bank building, providing we could raise the capital stock. That conversation referred to in Chilberg's letter was before we had any hope of getting any money. I do not know what Chilberg referred to in that letter. I admit without any qualification I received the letter marked Exhibit 203.

Receiver's Exhibit No. 203.

Aug. 16, 1919.

Mr. J. E. Chilberg,
1410 Alaska Building,
Seattle, Washington,

Dear Mr. Chilberg:

I have been thinking over what you said in your letter of August 6th and the final plans for financing this building. [817]

The proposition as I have made it out is as follows:

Cost of Old building and purchase of Drury lot	$350,000.00	
	60,000.00	
	———	$410,000.00
Cost of bare building, approximated		790,000.00
Total amount to be raised		$1,200,000.00

We are safe in assuming that we can get a loan which will net $712,500.00, leaving $487,500.00 to be raised on a second mortgage and in capital stock. If the bank in Seattle would agree to take $100,000.00 of the first serial numbers of second mortgage bonds, it seems to me that the bank here could carry at least $150,000.00 without any criticism. Some of these bonds could very likely be sold by our bond department and this would leave a very small amount to be raised by capital stock.

I have instructed our attorneys to incorporate immediately a corporation to be known as the Eleventh Street Improvement Company, or some other suitable name. This corporation will purchase the property from the bank and Drury, construct the building and operate it. When we get that far, I will very likely make a proposition to Percy Shanstrom to come over here and take charge of the entire affair leaving my time to develop the bank.

Very sincerely yours,

____________________,

Vice-president.

OSL/B.

I wrote the letter marked Exhibit 204.

Receiver's Exhibit No. 204.

August 20, 1919.

Mr. J. E. Chilberg,
1410 Alaska Building,
Seattle, Washington,

Dear Mr. Chilberg:

I am pleased to acknowledge receipt of your let-

ter of August 19th wherein you say that you will take a reasonable proportion of the second mortgage on the new bank building in Tacoma.

After conferring with Drury, Thompson and Williamson yesterday, when Simpson had delivered his message to me over the phone, we wired him this morning to accept the loan of $800,000.00, which will net us $720,000.00 in cash. Simpson also told me over the telephone that he would arrange a second mortgage bond issue of $150,000.00. This ought certainly to finance the building properly and let the bank get out of it nearly all of what it now has in the property. The bank building company may not be a success. The bank, [818] however, housed in the building, with that as an advertisement, must be, and will be a success.

Very sincerely yours,

——————————,

Vice-president.

OSL/B.

August 19, 1919.

Mr. O. S. Larson,

Vice Pres., Scandinavian-American Bank.

Tacoma, Washington.

Dear Mr. Larson:

We will arrange to take a reasonable proportion in the second mortgage on the new building in Tacoma. I do not, however, think the total of the first and second mortgages should exceed 75% of the value of the ground and building. If it does we probably would be criticized. In New York they go as high as 80% but Seattle and Tacoma securities

(Testimony of O. S. Larson.)

are not considered as reliable as New York. Therefore, I think you better figure about that way and let stock be placed covering the difference.

Yours very truly,
(Signed) J. E. CHILBERG.

That letter from Chilberg says that we ought to be able to finance the building proper and let the bank get out of it nearly all that it has in the property, that is exactly what it says. That was the intention. Just what letter says. I received the telegram marked Exhibit 205.

Receiver's Exhibit No. 205.

MW. New York, NY. Oct. 15, 1919.

O. B. Larson

Scandinavian American Bank Tacoma Wash.

Appraisals of land and value of building so far as we can figure will not permit loan over Six Hundred Thousand Stop If this is satisfactory please wire day message and we will endeavor to have loan authorized at meeting of committee expected for Friday morning.

WALTER STABLER,
Comptroller Metropolitan Life Ins. Co. [819]

We were trying to get a loan from the Metropolitan at that time. I received the letter from Bausman & Oldham marked Exhibit 206.

Receiver's Exhibit No. 206.

Seattle, Washington, November 12, 1919.

Scandinavian-American Building Company,
c/o Scandinavian-American Bank,
Tacoma, Wash.

Gentlemen:

We have received from the Metropolitan Life Insurance Company authorization of a $600,000 loan to be made to your company on the property at the Northeast corner of Pacific and Eleventh Street.

We would be glad to talk over the details of this loan with you at your earliest convenience.

Very truly yours,
BAUSMAN & OLDHAM.
(Signed) By OLDHAM.

R.

I wrote Exhibit 207 in reply to that.

Receiver's Exhibit No. 207.

Nov. 13, 1919.

Hon. Robert P. Oldham,
Hoge Building,
Seattle, Washington.

Dear Mr. Oldham:

This is to acknowledge receipt of your letter of November 12th regarding authorization received by you of a loan of $600,000.00 to be made to the Scandinavian-American Building Company on the property at the Northeast corner of Pacific Avenue and Eleventh Street in Tacoma. I shall be very glad to

take this matter up with you at your earliest convenience and to get all the necessary papers into your hands as speedily as possible. [820]

The company will purchase 50 feet from the Scandinavian-American Bank and 25 feet adjoining on Pacific Avenue from Mr. Charles Drury.

There seems to have been some mistake made in the appraisal of this real estate which the company had made in fixing the value I believe at Two Hundred Sixty odd thousand dollars. I am quite sure that I could sell it before to-morrow morning for $400,000. Mr. C. Wallace Simpson of Philadelphia, who was instrumental in introducing us to the Metropolitan Life Insurance Company with the application, is in the city now and I would like to bring him over with me when we get ready to discuss the details of the loan. I am quite sure that we will get along very satisfactorily.

Very sincerely yours,

——————,

Vice-president.

OSL: B.

I received the telegram marked Exhibit 208.

Receiver's Exhibit No. 208.

FY Philadelphia Pa Oct 25–19.

O S Larson

Scand Amn Bank Tacoma Wash

Have meeting with Stabler Tuesday at which time loan will be passed by Committee Stop My business finished here Mrs Simpson sick hope she

will be well enough so we can leave here Thursday Best regards to all Am anxious to be on my way.

G. WALLACE SIMPSON.

The Metropolitan Life required an appraisal to be made by the real estate board of Tacoma. That telegram, Exhibit 209, I saw, the mortgagor had to pay the fee of the board for appraising the property. I was in Chicago when Exhibit 209 was sent, Ogden showed it to me after I got home.

Receiver's Exhibit No. 209.

October 18, 1919.

Mr. Walter Stabler, Comptroller,
Metropolitan Life Insurance Co.,
Metropolitan Building, New York City.

[821]

Dear Sir:

Enclosed herewith please find confirmation of telegram sent you in reply to your telegram of November 15. I have nothing to add to what I have already said about the valuations, except that Mr. Webber, the architect and a large property owner and experienced builder of many years standing, from Philadelphia, has just been here and thoroughly investigated the entire matter. He is of the opinion that taking into consideration the value and location of the land, the great necessity for and the nature of the improvement, backed in by large and prosperous city and community, a loan of $650,000.00 on the property is considered very small. However, we will be able to get along very nicely with $600,000.00 on the terms heretofore agreed

upon between us. Nevertheless, in view of the fact that the money is not to be advanced for several months, we would like to submit to you additional information and evidence as to the value of this bank building property when finally completed, and we are satisfied that you will come to the conclusion that the original amount of $650,000.00 is not excessive, but is a first-class loan in every particular, and that you will then agree to authorize the full amount of $650,000.00.

With kindest personal regards,

Very sincerely yours,

——————————,

Vice-president.

OSL/B.

Tacoma, Wn., Oct. 16, 1919.

Walter Stabler, Comptroller,
Metropolitan Life Insurance Co.,
Metropolitan Building, New York City, N. Y.

Referring your telegram Fifteenth we will accept Six Hundred Thousand but request permission submitting to you additional evidence that loan of Six Hundred Fifty Thousand is not excessive considering location, value of land, value of proposed improvement and solid prosperous condition of community behind it. Frederick Webber four hundred three Morris Building, Philadelphia, architect, now here completing plans which will be submitted to your architects forthwith. G. Wallace Simpson arriving here October twenty-seventh. Complete additional information will be furnished not later than

November Tenth. In meantime we will accept authorization Six Hundred Thousand according to terms heretofore agreed upon.

OLE S. LARSON,
Vice-president.

Charge: Scand. Am. Bank. [822]

Oct. 14, 1919.

Mr. Walter Stabler, Comptroller,
Metropolitan Life Insurance Co.,
New York City, N. Y.

Dear Mr. Stabler:

I returned from New York and the east last Saturday and now beg to confirm receiving from you the following telegram:

"Cost of appraisal by our appraisers one hundred fifty dollars Stop This fee must be paid by you. If satisfactory please telegraph your approval."

To which our Mr. Ogden replied as follows:

"Will pay bill for appraisal when authorized by you."

We hope that the appraisal will be satisfactory in very detail and upon receipt of the bill we shall be very much pleased to remit the amount due in New York exchange.

Referring further to your letter of September 19th, I wish to advise you that upon receipt of this letter we immedately employed Mr. Frederick Webber, 403 Morris Building, Philadelphia, to prepare the necessary plans and specifications covering the bank and office building structure referred to in your letter of September 19th. Mr. Webber is now

in Tacoma and expects to return to Philadelphia some time next week leaving here Friday night. When leaving here, he will be thoroughly familiar with the cost of material, labor conditions and every other detail in connection with the construction of this building. Minor matters in regard to the plans will be adjusted during the next few days, and I am of the opinion that the plans will be ready to submit to your architect, Mr. D. E. Waid, in the course of the next two or three weeks, and I am quite sure that he will find everything satisfactory.

Mr. G. Wallace Simpson was to have accompanied the writer west last week, but owing to some unfinished business, was delayed in Philadelphia for several days.

With the kindest personal regards, I am,

Very respectfully yours,

——————————,

Vice-president.

OSL/B. [823]

POSTAL TELEGRAM.

Tacoma, Wash., Oct. 2d, 1919.

Mr. Walter Stabler,

Comptroller Metropolitan Life Insurance Co.,

New York, N. Y.

Will pay bill for appraisal when authorized by you.

M. M. OGDEN,

Cashier Scandinavian-American Bank.

(Testimony of O. S. Larson.)

(Charge)

New York NY Oct 1 1919

Scandinavian American Bank.

Tacoma Wash.

Cost of appraisal by our appraisers one hundred fifty dollars Stop This fee must be paid by you if satisfactory Please telegraph your approval.

WALTER STABLER,

Comptroller Metropolitan Life Ins. Co.

10 PM.

We had to pay the architect his fee, we paid him $2500.00 this was done on the authorization of this loan. He did not come to Tacoma personally, he sent his assistant, Mr. Bishop, who inspected the building site.

When we began to find out we needed money to build this building, we tried to get money from the Metropolitan Life, did not try any other source that I know of. We agreed that was the cheapest loan in the market, the best and easiest terms to pay back on. I received the letter of June 20th, from the Metropolitan Life Insurance Company. The $2500 architect's fee was paid by the building company, some time in the spring or summer of 1920. [824] Mr. Bishop analyzed the cement that went into the foundations and checked over every foot of the specifications he was here for two weeks in August, 1920. I got the letter and wrote the reply thereto marked Exhibit 210.

Receiver's Exhibit No. 210.

July 7, 1920.

In re: N. E. Corner Pacific and 11th St., Tacoma, Washington.

D. Everett Waid, F. A. I. A., Architect,
No. 1 Madison Avenue,
New York City.

Dear Mr. Waid:

This is to acknowledge receipt of your letter of July 2d.

I have had this communication copied and forwarded same to Mr. Frederick Webber, 403 Morris Building, Philadelphia, for his consideration in the matter. If I understand your letter correctly, you would like to have added to the building plans and to construct one only out of these three:

1st: A second interior stairway, or

2d: An exterior stairway (iron fire escape; or

3d: Have the doors to all rooms opening into corridors fire-proof.

I wish you would advise me if I am understanding this thing the way you do. Some few weeks ago I happened to run across the fire adjuster for the North Pacific Coast District and I requested him to come to our office and look over the plans for the new building. He expressed the opinion that one fire-proof tower would be sufficient in order to safeguard all persons that might be in the building at any one time.

You realize that the construction of this building

must necessarily take some account of the ultimate cost. The building plans, as they stand, are running fully $350,000.00 ahead of any estimates which we had made at the time we applied for this loan. It is absolutely necessary to secure this loan in order to complete the building, and we will, of course, go to any reasonable extent in modifying the plans so as to harmonize with the views of the Metropolitan Life Insurance Company.

In a previous letter to Mr. Simpson, I suggested to him that we hold this matter in abeyance until such time as you have been able to get out here personally with Mr. Webber, when we will all be very glad to canvass the situation with you and to decide definitely with all of you present here on the ground what [825] is the best and most expedient thing to do under the circumstances. I think that will be the best thing to do for all concerned.

With the kindest personal regards and hoping to see you out here soon, I beg to remain,

Very sincerely yours,

____________________,

President.

OSL/B.

P. S.—You might communicate with Mr. Frederick Webber, 403 Morris Building, Philadelphia, and learn when he expects to leave for the west. The foundations for the building have all been completed several days ago and the structural stool has begun to arrive.

July 2, 1920.

In re N. E. Cor. Pacific & 11th Streets, Tacoma, Washington.

Mr. A. S. Larson,
Pres. Scandinavian-American Bank,
Tacoma, Washington.

Dear Sir:

I am in receipt of a letter from Mr. Simpson, transmitting check which accompanied your letter addressed to him under date of June 22d, for which please accept my thanks.

With reference to your expressed opinion that the lender is safeguarded without the additional exit requested, I would say that from my own personal point of view, owners and lenders are under obligation to safeguard life as well as property. Two of the most disastrous fires which occurred in recent years were in fireproof buildings. One of these, known as the Triangle loft building fire, happened in New York City and while there was very little damage to the building itself, there was a very great loss of life.

From the point of view of the lender, in this case, it is a matter of business as well as of humanitarian interest for them to insist upon all reasonable safeguards. It so happens that the Metropolitan Life Insurance Co. carries insurance on one out of every eight persons in the country and any disaster to life, whether an accident on a railroad, an epidemic of influenza, or a fire, is quite sure to involve payment to death claims by that Insurance Company.

(Testimony of O. S. Larson.)

It is a well established principle, recognized by law in some cities including New York, if not Tacoma, that there shall be two means of exit from a building. In your building, since the plans provide only one stairway, I have insisted that a second interior stairway, or at least an exterior stairway, should be provided. The Metropolitan Life Insurance Co., however, have agreed to waive this requirement on the condition that the doors to all rooms, opening into corridors, shall be fireproof. If the doors have already been made, as intimated in your letter, I suggest that [826] the stairway be provided and would be glad to receive a plan from your architect for approval accordingly.

I hope very much that on further consideration you will realize that this requirement is just and reasonable and in the best interest of all concerned.

Very sincerely yours,

(Signed) D. E. WAID.

The architects of the Metropolitan Life Insurance Company discussed with us the details of the construction of the building, we sent them photographs of the building every week and they were getting duplicate reports from Mr. Webber and Mr. Wells. Exhibit 211 is a letter along that line.

Receiver's Exhibit No. 211.

July 28, 1920.

In re: Scandinavian-American Bank Bldg., Tacoma, Wash.

Mr. O. S. Larson, President,
Scandinavian-American Bank,
Tacoma, Washington.

My Dear Mr. Larson:

I have yours of the 21st inst. at hand and will say in reply, that I was in touch with Mr. Webber yesterday, who thinks it better to leave the matter of the corridor doors and the second stair for final discussion and settlement when we meet in Tacoma and have arranged with Mr. Webber, to be there on or about the 10th of August.

Yours very truly,
(Signed) D. E. WAID.

And Exhibit 212 also.

Receiver's Exhibit No. 212.

November 10, 1920.

D. Everett Waid, F. A. I. A.
1 Madison Avenue,
New York City, N. Y.

Dear Mr. Waid:

I was just on the point of writing to you when your letter of November 3d came to hand, and yesterday afternoon I had a talk with Mr. Sherman Wells, Superintendent of Construction of the [827] building, who promised me that he would

write you at least once a month as to the progress of the construction.

We are very glad to report to you that the exasperating condition regarding our steel order was finally broken about the 10th of October, practically all the steel arriving at the same time. By the close of the day, I expect that nearly one-half of the entire steel tonnage will be in position and riveting will very likely commence next week.

I think Mr. Webber was very fortunate in securing the services of such a splendid superintendent as Mr. Wells. I presume Mr. Bishop told you that he came from the East where he has had a long and satisfactory experience in New York, Philadelphia, Washington and other cities. I am sure that we could not have been able to get the services of a better man.

I would have written you sooner but I expected that Mr. Webber's office in Philadelphia, who are receiving daily reports, would keep you informed. I should very much appreciate it if you would inform Mr. Stabler that we are out of the woods and on our way with this beautiful building.

When do you expect to come out again for another inspection? Perhaps you will be able to come yourself next time.

Very sincerely yours,

——————————,

President.

OSL/R.

November 3rd, 1920.

In re Pacific & 11th Streets, Tacoma, Wash.

Mr. O. S. Larson, President,
Scandinavian-American Bank,
Tacoma, Washington.

My dear Mr. Larson:

Since Mr. Bishop's return from the West, I have had no report as to the progress of your building—whether you have been fortunate enough to get steel delivered fast enough to keep the work going or whether you are still encountering exasperating delays.

In order that I may keep informed as to the progress of the work, I would appreciate it very much if you or your job superintendent would write me a short report and keep me informed from month to month so that I may be able to notify my clients at any time they wish information regarding the building.

Very truly yours,
(Signed) D. E. WAID. [828]

The following is Exhibit 213.

Receiver's Exhibit No. 213.

June 22, 1920.

Mr. G. Wallace Simpson,
Medical Arts Building,
Philadelphia, Pa.

Dear Mr. Simpson:

On Saturday we received your telegram of the 17th instructing us to send you check for $2500, payable to D. Everett Wade, architect for the

Metropolitan Life Insurance Company, to apply upon his expenses and fee in connection with the examination of the building as the work progresses, and enclosed herewith we are handing you check No. 223 for $2500, made payable according to instructions. You may use your own judgment about delivery of this check to Mr. Wade.

We have gone over the substance of your telegram about eliminating the extra stairway and that the insurance company is now agreeable to do this, but that they insist upon fireproof doors leading into the hall-ways, where the floors are subdivided. We have taken this to mean that they desire all the doors leading into the hallway to be metal doors. In connection with this matter, we also received a telegram from Mr. Webber substantially to the same effect. I have also taken the matter up with some of the fire insurance people and they cannot see where it would in any way improve the security of the Metropolitan Life Insurance Company. They claim that the building would be practically fireproof anyway, whether the stairway or the metal doors were placed in the building, and further that the building would be amply covered by insurance to take care of any loan which the life insurance company might have on the property. I wired Mr. Webber that in our opinion substitution of metal doors is now impossible because the mill bought mahogany for all the woodwork, according to the contract which was let to them, that the work was now in process of manufacture and I doubt if any

change can be made without a great loss to the building company.

I would suggest that this matter be left in abeyance until Mr. Wade arrives here on the ground and give Mr. Webber and ourselves a chance to go over the entire situation with him regarding this matter. It seems to me that the Metropolitan Life Insurance Company would not jeopardize a dollar in making a loan on the building according to the plans and contract now let by Mr. Webber, because the building would be insurance for $600,000.00 more than the loan which they have committed themselves to make. I am confident that some way will be found to get around this new requirement which they have made, and which I think is absolutely unnecessary.

Very sincerely yours,

——————————,

President.

OSL.B

Enc [829]

The following is the continuation of Exhibit 213.

1920 June 17 AM 7 33

FY Philadelphia Pa 16.

O. S. Larson

Scandinavian American Bank Tacoma Wash.

Send me check twenty-five hundred Order D. Everett Wade Architect Metropolitan Life Stop This to cover express Examination as work progresses Stop Have arranged to cut out extra stairway but they will insist upon all doors leading hallway where floors subdivided being fireproof

Stop This change should not amount over one quarter what additional stairway would cost and keeps floors intact for people like Standard Oil Stop Saw Stabler this morning Everything satisfactory.

G. WALLVE CIMPSON. [830]

November 9, 0.

D. Everett Waid, F. A. I. A.,
Architect,
1 Madison Avenue, New York.

Dear Sir:

Your letter of November 3rd, 1920 addressed to Mr. O. S. Larson requesting information as to the progress of our building was handed me today.

We have received seventy cars of structural steel out of seventy-four, which is the complete shipment. We have erected 747 ton in position. We have not yet started riveting, but expect to commence by the 15th of November. All the foundation walls are up to grade. Have all material for centering for floor arches—all terra cotta floor arches ready. We are unloading face terra cotta at the railroad yards. The granite contractor is ready to start setting granite. Have 80% of rough plumbing pipe on the job, and it looks as though we would be able to push construction from now on.

If you so desire, I would be pleased to advise you monthly as to the progress of our work.

Yours very truly,

SCANDINAVIAN AMERICAN BUILDING CO.

(Signed) By SHERMAN WELLS,

Superintendent.

SWC.

CC—Mr. LARSON

Mr. WEBBER.

I received the letter marked Exhibit 214.

Receiver's Exhibit No. 214.

New York City, June 11, 1920.

Mr. O. S. Larson, Vice-Pres.,
Scandinavian American Bank,
Tacoma, Washington.

My dear Mr. Larson:

I am in receipt of yours of the 5th instant and am glad to know that the work of the new bank and office building is progressing. [831]

Your trouble in obtaining steel and other materials exists here, to a very alarming extent and no one knows when they start a building operation when it is likely to be finished. I should judge there is no likelihood of the building being finished by November 1st, but that will make no particular difference to us.

Referring to the bonding of the building. As I told you in the beginning, we would not make any advances on this operation until the building is completed. It is too far away for us to consider

(Testimony of O. S. Larson.)

such a proposition and the bond would not, in our opinion, be of much use to us in case of any trouble. With our commitment and our mortgage of record, I should think that you could arrange to finance the matter with your own funds or those obtained from other sources for temporary use. When the building is finished and our architect has passed it, we will be very glad to make the advance.

I was very much gratified to have the National Bank of Tacoma take over the corner of 12th St. and Pacific Ave., adjoining the National Realty Building, as I believe they intend to erect an attractive banking building there and they have already paid us, I believe, $100,000 on account of that loan. The restriction on the corner still provides that the building may not be erected more than three or four stories in height.

Yours very truly,
(Signed) WALTER STABLER,
Comptroller.

WS/MIR.

In cross-examination this morning I told you that Simpson was endeavoring to get a temporary loan for $300,000 or $400,000 because we had not expected that this building would take more than six or seven months at the most to complete, from the time we started to break the ground. I sent Mr. Bean from New York with instructions to Mr. Drury to abandon everything in connection with this building, on account of the general financial conditions in December, 1919, but when I came home Christmas Eve I found Mr. Drury had torn

(Testimony of O. S. Larson.)
the fittings out of this building, and part of the concrete out of it in violation of my instructions. Drury was President of the Building Company. I received Receiver's Exhibit 214. I told you that Simpson was endeavoring to get a temporary loan of $300,000 or $400,000 because we had not expected that this building would take more than six or seven months to complete. I sent the telegrams and letters marked Receiver's Exhibits 215, 16, 17 and 18. [832]

Receiver's Exhibit No. 215.

NIGHT LETTER

Tacoma, Wash., December 31, 20.

G. Wallace Simpson,
Medical Arts Building, Philadelphia, Pa.

Can you by any possible means get us advance mortgage three or four hundred thousand This will complete building or can you get any definite assurance of million dollar loan referred to your last telegram Happy New Year.

O. S. LARSON.

Receiver's Exhibit No. 216.

NIGHT LETTER

Tacoma, Wash., December 16, 20.

G. Wallace Simpson,
Medical Arts Building, Philadelphia, Pa.

Referring your telegram thirteenth strongly suggest you see Stabler and if possible get advance suggested our telegram thirteenth Boyle again press-

(Testimony of O. S. Larson.)

ing Penn Mutual matter Have you seen Hamer and what is his final decision Answer.

O. S. LARSON.

Receiver's Exhibit No. 217.

NIGHT LETTER

Tacoma, Wash., December 23, 20.

G. Wallace Simpson,

Medical Arts Building, Philadelphia, Pa.

What results with Hamer last Monday and did you get anywhere with Stabler on Tuesday We should have some relief shortly Seasons Greetings to you and Mrs. Simpson.

O. S. LARSON. [833]

Receiver's Exhibit No. 218.

Tacoma, Wash., Jan. 22, 1920.

G. Wallace Simpson,

Medical Arts Building, Philadelphia, Pa.

When are you coming west. Would appreciate your assistance framing second mortgage bond issue bank building. Answer.

O. S. LARSON.

Mr. Hamar referred to in Exhibit 216 was the Treasurer of the Penn Mutual Life Insurance Company and Boyle is their agent. The proposition with Mr. Stabler referred to in the night letter of December 23d, was to get him to advance 1/3 of the $600,000 mortgage. I think I had considerable correspondence and telegrams and letters running up into January, 1921, just before the bank

(Testimony of O. S. Larson.)
closed with reference to this matter. I was sick the last week and I was not there. They say that I was drunk that week, but that is not true. At the time I sent the tetlegram of Dec. 31st, 1920, Simpson was negotiating with Peabody-Hotelling Company of Chicago for an advance, so that up to the time the bank closed, we were constantly endeavoring to obtain a loan of $300,000 or $400,000 to continue the construction of the building. It was never the intention that the Scandinavian-American Bank of Tacoma was intended to finance that building. Never was at any stage of the game the intention that the bank should finance any part of it. It was not the intention that the bank would be paid all of its advances out of the $600,000 mortgage. I figured that the bank would then have $350,000 of second mortgage bonds for the real estate. There was $65,000 of water in the real estate carried by the bank that should be written off. The building was estimated to cost $1,080,000. To pay that we would have the loan of the Metropolitan for $600,000 the capital stock of the building company which had been paid in [834] $200,-000 and open loans by the bank to the building company secured by second mortgage bonds of $280,-000, and out of this $280,000 the Scandinavian-American Bank of Seattle was to take $150,000, leaving $130,000 for this bank. That is the proposition in all its simplicity and it is not a violation of any law existing then or existing now. I refuse to state whether a deed from the Scandinavian-American Bank to the Scandinavian-American

(Testimony of O. S. Larson.)

Building Company, was executed on February 10th, 1920, for that is in a criminal indictment which has been found against me because I have been arrested 36 times and I am not going to be arrested the 37th. I object to answering questions with reference to the statement of the financial condition of the bank of February 28th, 1920, for the same reason, my name is on it, but I did not sign it. I expected simply to use the $600,000 second mortgage for the purpose of making this temporary loan of $300,000 or $400,000, it was to be used as collateral, there is no question about that at all. The $600,000 mortgage assignment was not taken with any idea of security or preference whatever, and when I got back on October 17th, I told the bank commissioner we would have to carry this building to its completion before we could get the money from the Metropolitan and he said he would talk it over with the Attorney General and let us know if there was any objection to it. But he did want us to collect some money from some of the large borrowers in the Bank. He made that condition. I never told Mr. McCrery or Mr. Frank Lamborne, one of the trustees of the bank, or anybody at all that not one cent of the money of the Scandinavian-American Bank of Tacoma was to go to the building. I received the letter marked Receiver's Exhibit 219. [835]

Receiver's Exhibit No. 219.

June 21st, 1920.

Mr. O. S. Larson, President,
Scandinavian-American Bank,
Tacoma, Washington.

Dear Sir:

A short time after my appointment as Bank Commissioner I called upon you at the bank, only to learn that you were absent in the east. As your board was about to hold its regular meeting I was invited to remain and talk over several objectionable matters with them.

Among other things criticised was the large amount of money loaned to your directors and stockholders and to corporations in which they are interested. Loans to corporations with which Jafet Lindeberg is connected and loans to G. Lindeberg, your Vice President, and corporations in which he is interested were particularly called to the attention of your board. Mr. Lindberg is without doubt extending his operations beyond the limits of safety and must be required to reduce his various indebtednesses. It was my understanding that Mr. Lindeberg's companies were to pay up what they owed and that his personal indebtedness would be reduced.

The practice of allowing overdrafts has apparently gotten beyond control as shown by the report of last examination. The fact that the overdrawing of the account of an officer, director or employee

constitutes a felony should be sufficient warning to all offenders. It does not, however, appear to be, inasmuch as a great many of the overdrawn accounts are of officers and employees.

The "memo" carried in your loans and discounts, representing unpaid advances made for W. H. Metson, $4, 375.00, E. O. Lindblom, $70,000.00 and Jafet Lindeberg, $89,250.00 and advance made by this bank amounting to $17,500.00, a total of $181,125.00, all of which was paid to the Federal Reserve Bank, Seattle, must be eliminated if it has not already been. This transaction is irregular and all of the advances made must be taken up in cash and not by personal notes. A complete report of this matter will be appreciated.

Items listed under Schedule "A," sheet 11, of the last report of examination were to be charged off as soon as your capital was increased. Will you please advise me whether or not this was done.

The South Willis and Pierce County Coal Companies liabilities appeared to be in a fair way to be eliminated from your assets. This office has received no report as to the result of the contemplated sale of the coal companies' property to the Peabody interests. Will you kindly give me the full details pertaining to this matter.

Your bank at the time of the last examination was instructed to reduce its line of auto loans. This paper was not in the best of shape and much grief could be expected should a business depreciation be encountered. Conditions at this time make it even more imperative that automobile loans be materially

(Testimony of O. S. Larson.)

reduced and no dealers financed unless an excellent financial statement is shown. [836]

It is some time since your bank was examined and I trust that many of the objectionable items have already been eliminated. You have yourself informed me of a number which you have been able to collect. For this reason I will not go further into the matter of your last examination. In discussing with your board the building which is being constructed by the Scandinavian-American Building Company and which it is intended that the bank shall occupy, it was stated that the bank would carry second mortgage bonds or would in some way finance the building. This was not the understanding of this department and as I recall it you told me at one time in Tacoma, that your building was to be financed without using one cent of the bank's funds. Kindly let me hear from you on this subject as it is very important that there be no misunderstanding in the matter.

Yours very truly,

(Signed) CLAUDE P. HAY,

Bank Commissioner.

CPH:HS.

I refuse to answer upon the same ground whether or not the bank commissioner informed me that I had represented that not one cent of the bank's money was to go into the building. I do not know whether or not four days after the receipt of that letter, I put $200,000 of the funds of the bank to the account of the building company. Nothing illegal about it if I did. I received the letters

(Testimony of O. S. Larson.)

marked Receiver's Exhibit 220 and 221, but with reference to Exhibit 221, I want you to understand that I went down to Olympia before this letter was received, on October 17th, 1920, and had a conference with Mr. Hay and told him the whole story about the building and he said he would talk to the attorney general about it and we told him we would have to go through and complete the building, that there was no way out of it, until we could get the Metropolitan money, and that letter (Exhibit 221) is confirming that conversation. I received the letters marked Exhibit 220 and 221. [837]

Receiver's Exhibit No. 220.

August 23, 1920.

Mr. O. S. Larson, President,
Scandinavian-American Bank,
Tacoma, Washington.

Dear Sir:

In going over the report made by your bank to this department, in response to the call of June 30, I note an item of $200,000, carried in stocks, securities etc. This item is called Scandinavian-American Building Company, and the date acquired is given as June, 1920. In other real estate owned an account of $101,783.06 is shown as Scandinavian-American Building Company, and the date acquired as 9–29–19.

Will you kindly give me complete information relative to the two items mentioned?

My attention is also called to the fact that the reserve of your bank on the date of the call was

only 12%. This is a condition which should have your serious consideration, and you are hereby directed to bring your reserve up to meet legal requirements at once.

Yours very truly,
(Signed) CLAUDE P. HAY,
Bank Commissioner.

CPH:H.

Receiver's Exhibit No. 221.

November 12, 1920.

Mr. O. S. Larson, President,
Scandinavian-American Bank,
Tacoma, Washington.

Dear Mr. Larson:

As I am to-day leaving for a two-weeks' trip to California I shall be unable to take up with your Board the matter of your new building which you and Mr. Drury discussed with me in my office recently.

At this time it is my desire that the building be constructed and brought to completion without having the Scandinavian-American Bank in any way made a party thereto, and I desire particularly to remind you that you must use great care in order that the bank may not be allowed to appear in any way as a guarantor for any bills or accounts in connection with the construction of the building.

When talking with Mr. Drury recently I informed him that this department would not consider allowing your bank to carry the building as an

(Testimony of O. S. Larson.)

asset until the objectionable paper of officers, directors and stockholders was entirely eliminated. After this [838] matter has been satisfactorily taken care of this department will go into the matter more fully and, should it feel that it is justified to do so, it may allow you to carry your building at an amount slightly in excess of the 30% of your capital, surplus and undivided profits, as set forth in the law.

I hope to be able to go into this matter fully upon my return from the South.

Yours very truly,

(Signed) CLAUDE P. HAY,

Bank Commissioner.

CPH:H.

In further explanation of that letter, Exhibit 221, these loans to the building company and the capital stock of the building company had not been acquired by the Scandinavian-American Bank, in violation of any existing laws of the State of Washington, and I have been indicted on four counts on account of loans made to the building company, not because they were made in violation of the law, but because they were made to a concern in which the directors were interested without a resolution of the board. After I received the letter of June 21, 1920, I believe there was one loan over the capital stock of the building company, which I never considered a loan and which was not in violation of any existing law at that time.

Q. On November 8, 1920, six days after you re-

(Testimony of O. S. Larson.)

ceived this last letter from the Bank Commissioner, telling you not to—

A. You better read the letter; it does not prohibit any loan at all, [839] it prohibits signing directly any contract whereby the bank would be liable for damage suits or bills against that building.

Q. Or carrying any of that money?

A. It never says that at all.

Q. As an asset of the Bank Building Company.

A. I disputed with him,—

Q. After this letter of June 21?

A. That was settled in Olympia at that conference with Mr. Hay on the 17th of October, I am telling you.

Q. On the 8th day of November, 1920, you loaned to the Scandinavian-American Building Company the sum of $100,000 did you not?

A. I believe that was a renewal of another loan they had there. I am not ready to testify on any of this security. I did not keep the books there at the bank and Mr. Geiger's testimony on that should be more accurate than mine, I never made a scratch or a figure on those books in all the four years I was there. That is my signature on Defendant's Exhibit 190, "O. K. O. S. Larson." I admit buying that stock and I also want to say the board of directors knew all about it. That it was passed on by Mr. Williamson as being perfectly legal and above-board in every respect. They never objected to it, they knew all about it. I do not be-

(Testimony of O. S. Larson.)
lieve it was ever brought up at any meeting of the stockholders, nothing in the law that required me to do it. The matter was brought up at a meeting of the board of trustees in April and again in December, 1920, and very thoroughly discussed and understood. I do not remember the directors who knew of it. The Bank Commissioner never objected to that and never protested against it. I have never examined the records of the bank to determine whether or not the Board of Trustees or the stockholders passed a resolution [840] authorizing me to subscribe for the stock of the Scandinavian-American Building Company for the bank or to pay that money for the bank, I presume there is such a resolution, because I have not been indicted for it. The note was delivered with the mortgage and the assignment to me in Chicago. At that time it was understood that the assignment of the mortgage itself carried with it an assignment of the note. I received the telegram marked Receiver's Exhibit 222.

Receiver's Exhibit No. 222.

1919 Dec. 30 PM 5 53.

FY Philadelphia Penn 30

Geo Williamson

Scandinavian-American Bank Bldg. Tacoma, Wash.

Had conference with Stabler Metropolitan Stop You can prepare mortgage to anyone you wish Stop Metropolitan will take an assign*emtn* of

this mortgage Stop In the meantime you can prepare participation agreement which this mortgage will secure Stop The participation you can use as collateral for money borrowed during the construction Stop Stabler is writing Oldham as to form etc Stop Happy New Year to all

G. WALLACE SIMPSON. [841]

Receiver's Exhibit No. 223.

$600,000. March 10th, 1920.

For value received, without grace, I promise to pay to the order of G. Wallace Simpson, of Philadelphia, Pennsylvania, the principal sum of Six Hundred Thousand Dollars ($600,000), with interest thereon from date hereof at the rate of six per cent (6%) per annum, until maturity, payable semi-annually on the first days of May and November of each and every year. Said principal sum shall be paid as follows:

Ten Thousand Dollars on November 1, 1921;
Ten Thousand Dollars on May 1, 1922;
Ten Thousand Dollars on November 1, 1922;
Ten Thousand Dollars on May 1, 1923;
Ten Thousand Dollars on November 1, 1923;
Ten Thousand Dollars on May 1, 1924;
Ten Thousand Dollars on November 1, 1924;
Ten Thousand Dollars on May 1, 1925;
Ten Thousand Dollars on November 1, 1925;
Ten Thousand Dollars on May 1, 1926;
Ten Thousand Dollars on November 1, 1926;
Ten Thousand Dollars on May 1, 1927;
Ten Thousand Dollars on November 1, 1927;

Ten Thousand Dollars on May 1, 1928;
Ten Thousand Dollars on November 1, 1928;
Ten Thousand Dollars on May 1, 1929;
Ten Thousand Dollars on November 1, 1929;
Ten Thousand Dollars on May 1, 1930.
Ten Thousand Dollars on November 1, 1930;
Ten Thousand Dollars on May 1, 1931;
Ten Thousand Dollars on November 1, 1931;
Ten Thousand Dollars on May 1, 1932;
Ten Thousand Dollars on November 1, 1932;
Ten Thousand Dollars on May 1, 1933;
Ten Thousand Dollars on November 1, 1933;
Ten Thousand Dollars on May 1, 1934;
Ten Thousand Dollars on November 1, 1934;
Ten Thousand Dollars on May 1, 1935;

and the balance of said principal sum, to wit, three hundred twenty thousand dollars ($320,000), on November 1, 1935. Said principal sum shall bear interest from maturity until paid at the rate of twelve per cent per annum. Said principal sum and interest shall be paid in United States Gold Coin of the present standard of weight and fineness, at the Office of Metropolitan Life Insurance Company in New York, N. Y.

This note with interest is secured by a first mortgage of even date herewith, executed and delivered by the maker hereof to said G. Wallace Simpson, conveying certain real estate described therein, in Pierce County, State of Washington, the terms whereof are made a part hereof.

It is hereby agreed that if default be made in the payment of this note or any part thereof, or any in-

terest thereon, or if failure be made to perform any of the covenants or agreements contained in said mortgage securing this note, then, at the option of the holder of the same, the principal sum, with accrued interest, shall at once become due and collecible, without notice, time being of the essence of this contract, and said principal sum shall bear interest from such default until paid at the rate of twelve per cent per annum. [842]

In case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in such suit. I consent to a personal deficiency judgment on the above debt, with the intent that the same may be paid in full, irrespective of the security given therefor.

This contract is to be construed in all respects and enforced according to the laws of the State of Washington.

SCANDINAVIAN-AMERICAN BUILDING COMPANY.
(Signed) By CHARLES DRURY,
Its President.
(Signed) and by J. V. SHELDON,
Its Secretary.

(Attached to the above, are following revenue stamps:)

$100 Scand.-Amer. Bldg. Co. March 10, 1920—48717.
$10.00 Scand.-Amer. Bldg. Co. March 10, 1920.
$10.00 Scand.-Amer. Bldg. Co. March 10, 1920.

I cannot give you any reason why I signed the subscription list of the building company with my

(Testimony of O. S. Larson.)

individual name. The directors knew that I had pledged my credit for $200,000 which had been put into the bank and that I was not going to pay it, and that the bank was going to take the stock, and limit the liability on the construction of this building. I would not say that I had authority from anybody connected with the Scandinavian-American Bank, the stockholders or trustees, to make the subscription, they never did dispute it. The trustees had full knowledge of it and knew all about it at all times. I think they knew that it was done on behalf of the bank. They knew that I had pledged my credit for all the money I could raise that had been paid to this bank, and they all knew what was going on. I subscribed for that stock on behalf of the bank. I don't know what message it would carry to the mind of any second person. I do not know what that item of $9133.21 dated December 31, 1920, shown on sheet No. 233 of Flick's Exhibit 188 is. I do not know whether it is an interest charge on the $200,000 or not, you will have to prove that by somebody else. I wrote the letter marked Exhibit 224. [843]

Receiver's Exhibit No. 224.

April 15, 1920.

Bausman & Oldham, Attorneys,
Hoge Building,
Seattle, Washington.
Attention: Mr. R. O. Oldham.

Gentlemen:

Upon my return from the east, I beg to confirm

having sent you the following telegram from New York, March 11th, 1920:

"What answer did you receive from Stabler regarding proposed change Tacoma Mortgage. Would appreciate receiving night letter from you Saturday morning giving your latest information about this matter address Plaza Hotel New York. Kindest regards."

To which I received the following reply; dated at Seattle, March 13th:

"Stabler telegraphed no oral understanding with Simpson modifying original instructions, but assents to taking assignment mortgage from Simpson if we approve form of mortgage and assignment Stop This subject to original unmodified conditions Stop Mortgage to Simpson executed and recorded March tenth before construction work started everything satisfactory Stop Suggest if any changes or modifications originals authorization of loan you secure in writing from Stabler Stop Am writing Stabler details to-day."

I find that the mortgage for $600,000.00 was duly recorded by the boys here before any construction work whatever had been done on the new building. Everything seems to be getting along very nicely and the foundations to the new structure will very shortly be completed.

Very respectfully yours,

——————————,

President.

OSL/B

(TELEGRAM.)

Omaha, Nebraska, March 11th, 1920.

Robert P. Oldham,

Hoge Building, Seattle, Washington.

What answer did you receive from Stabler regarding proposed change Tacoma mortgage Would appreciate receiving night letter from you Saturday morning giving your latest information about this matter Address Plaza Hotel New York Kindest regards.

Address Plaza Hotel, New York.

LARSON. [844]

EXHIBIT 224 (Continued).

(TELEGRAM.)

Mar. 13, 1920.

From Seattle, Wn., 12–13.

To O. S. Larson,

Plaza Hotel, NYC.

Stabler telegraphed no oral understanding with Simpson modifying original instructions but assents to taking assignment mortgage from Simpson if we approve form of mortgage and assignment Stop This subject to original unmodified conditions Stop Mortgage to Simpson executed and recorded March tenth before construction work started everything satisfactory Stop Suggest if any change *m*or modification originals authorization of loan you secure in writing from Stabler Stop Am writing Stabler details to-day.

R. P. OLDHAM.

I saw the letter marked Exhibit 225 and I see I

am criticised because my account was overdrawn $42.50.

Receiver's Exhibit No. 225.

NOTICE TO OFFICERS AND DIRECTORS.

Scandinavian-American Bank of Tacoma, Washington, as at close of business January 5th, 1920. Examined Jan. 5, 6, 7, 8, 9, 10, 12, 13, 14, and 15, 1920.

To the Officers and Directors of the Above Bank.

An examination of your bank, made on the above mentioned day, reveals certain matters which must have your immediate attention. Herewith I submit certain requirements, which must be complied with promptly in order that your bank may be put in a satisfactory condition.

The lawful money reserve of your bank on the first above-mentioned date was 10.8 per cent. Your required reserve was fifteen per cent. If your reserve is below the legal requirement, this is a notice to you that said reserve must be made good immediately.

(There then follows under the title of "Cash Items" and "Overdrafts" a number of irregular cash items and overdrafts which the commissioner ordered collected or charged off and under the title "Real Estate" a number of pieces of real property which had been carried for more than five years which he ordered charged off.)

3. Bank Building: This account should be carried at $350,000.00 and the encumbrance of $70,000.00 shown on your books as encumbrance on real estate.

(Testimony of O. S. Larson.)

This paper is signed as follows:

By Order of the State Bank Examiner of Washington.

Dated January 5th, 1920.

(Signed) C. H. EBERTING,
Deputy State Bank Examiner. [845]

The term assignment, used in Receiver's Exhibit 224, means the substitution of Mr. Simpson's name in the mortgage in place of the name of the Metropolitan Life Insurance Company. The phrase in that order "This account should be carried at $350,000 and the encumbrance of $70,000 shown on your books as an encumbrance on real estate," I want to explain: Mr. Chilberg carried the real estate at what he called the equity, without showing the mortgage as a liability, that is the way it was carried in Seattle. This $70,000 was not an obligation of the bank and for that reason Mr. Chilberg did not want to show it as a liability. That is the reason why this property was temporarily deeded to Chilberg at the time the Penn Mutual Mortgage was secured, and then immediately deeded back to the bank after the mortgage had been secured and this controversy was up between the banking department and Mr. Chilberg. The Bank Commissioner was wanting to have this liability shown, that is all that amounts to. At the time the financial statement Receiver's Exhibit 226 was made, the bank was in a very healthy condition, $6,500,000 deposit. The statement marked Exhibit 226 shows a very healthy condition at that time, six and a half millions deposit. [846]

Receiver's Exhibit No. 226.

Condensed Statement of Condition of
SCANDINAVIAN AMERICAN BANK
of Tacoma
At the Close of Business May 4, 1920.

OFFICERS.

O. S. LARSON, President.
G. LINDBERG, Vice President.
J. V. SHELDON, Vice President.
DEAN JOHNSON, Vice President.
H. V. V. BEAN, Vice President.
M. M. OGDEN, Cashier.
A. T. GEIGER, Assistant Cashier.
O. J. JELLEBERG, Assistant Cashier.
N. A. DONELSON, Assistant Cashier.
F. C. HEWSON, Manager Bond Department.

RESOURCES.

Loans and Discounts........	$4,402,314.16
Customers' Liability Under Acceptances	6,526.80
United States Bonds........	262,295.00
U. S. Army Training & Supply Station Bonds, Pierce County Road and School Bonds and Warrants......	505,954.20
Railroad, Industrial and Local Improvement Bonds and Warrants	1,487,601.00
Banking House	280,000.00
Other Real Estate	209,794.60
CASH AND EXCHANGE...	1,186,611.20
	$8,341,096.96

LIABILITIES.

Capital Stock		$1,000,000.00
Surplus and Undivided Profits		248,528.09
Dividends Unpaid		1,909.28
Demand Deposits	$4,195,431.52	
Time and Savings Deposits.	2,338,701.27	
		6,534,132.79
Acceptances		6,526.80
Notes and Bills Rediscounted		150,000.00
Bills Payable		400,000.00
		$8,341,096.96

[847]

EXHIBIT 226 (Cont'd).

GUSTAF LINDBERG,
President of the Lindberg Grocery Company.

CHARLES DRURY,
Merchant,

GEO. G. WILLIAMSON,
Williamson, Williamson & Freeman, Attorneys.

J. P. SHELDON,
Vice-President.

DEAN JOHNSON,
Vice-president.

FRANK M. LAMBORN,
Allen & Lamborn Printing Co.

O. S. LARSON,
President. [848]

Receiver's Exhibit No. 227.

The
SCANDINAVIAN AMERICAN BANK
Tacoma, Washington
STATEMENT OF CONDITION
at Close of Business Feb. 28, 1920.

RESOURCES.

Loans and Discounts		$4,496,567.77
Customers' Liability Under Letters of Credit		7,000.00
Banking House		280,000.00
Other Real Estate		210,645.30
Railroad, Industrial and Local Improvement Bonds, Warrants, etc.		987,015.61
U. S. Army Training and Supply Station Bonds, Pierce County Road & School Bonds & War'nts		602,267.17
U. S. Bonds, Treasury Certificates, Cash and Exchange		737,602.05
		$7,321,097.90

LIABILITIES.

Capital Stock		$ 400,000.00
Surplus and Undivided Profits		105,622.19
Dividends Unpaid		949.28
Demand Deposits	$3,957,942.89	
Time & Sav. Deposits	2,324,583.54	
		6,282,526.43
Guaranteed Letters of Credit		7,000.00
Notes and Bills Rediscounted		150,000.00
Bills payable		375,000.00
		$7,321,097.90

OFFICERS.

O. S. Larson	President
G. Lindberg	Vice-President
J. V. Sheldon	Vice-President
Dean Johnson	Vice-President
H. V. V. Bean	Vice-President
M. M. Ogden	Cashier
A. T. Geiger	Assistant Cashier
O. J. Jelleberg	Assistant Cashier
N. A. Donelson	Assistant Cashier

DIRECTORS.

GUSTAF LINDBERG,
President of the Lindberg Grocery Company.

CHARLES DRURY,
Merchant.

GEO. G. WILLIAMSON,
WILLIAMSON, WILLIAMSON & FREEMAN, Attorneys.

J. V. SHELDON,
Vice-President.

DEAN JOHNSON,
Vice-President.

FRANK M. LAMBORN,
Allen & Lamborn Printing Co.

O. S. LARSON,
President.

(Testimony of O. S. Larson.)

I sent the telegram, Exhibit 229. The one, Exhibit 228, I don't remember anything about, but I think it refers in part to the liability bonds.

Exhibit No. 228.

(Flick.)

June 1, 1920.

G. Wallace Simpson,

Medical Arts Building, Philadelphia, Pa.

Under existing money condition have decided to take Metropolitan loan six hundred thousand. Am arranging with Hanson and Rowland Furnishing bond covering completion. Writing Stabler to-day. Have you any suggestions and when will you arrive here.

LARSON.

Exhibit No. 229.

(Flick.)

NIGHT LETTER.

Tacoma, Wash., November 20, — 20.

G. Wallace Simpson,

Medical Arts Building, Philadelphia, Pa.

Suggest you interview Stabler requesting advance two hundred thousand dollars against assignment of your mortgage and deposit by us additional security Pierce County bonds and Liberty Bonds Bausman and Oldham will recommend. Have you heard anything from Strauss.

O. S. LARSON.

Charge S. A. B.

OSL/R [850]

The stock certificates contain the names, the sig-

(Testimony of O. S. Larson.)

natures of Drury and Sheldon. I did not see them endorse theirs. I endorsed mine to transfer title to the bank. I do not know that they knew that I had endorsed mine, I am responsible for mine only. The note for $360,000 was made when I was beyond the boundaries of this State and I did not see it. The second mortgage bonds were to be in the sum of $750,000. $350,000 of those were to be turned over to the bank for the real estate, Mr. Webber said he wanted some of the bonds on hand when he came to final settlement with the contractors, because he said he could always work off some of them on the tail end of the contract, and he always did so in Philadelphia where they use third mortgage bonds instead of second, some of those bonds had agreed to be taken by the men who finished up the banking-rooms, and those that were left, if any, were to be held by the bank as collateral for any advances that they had on the wind-up. A matter of the leasing of the banking quarters and the basement was discussed with my associates and it was understood that the bank was to pay $25,000 or $30,000 a year. At the time I was discussing the lease by the bank of the bank quarters, the bank owned the stock and the bank was to get $350,000 of the second mortgage bonds on the building. Mr. Simpson was a stockholder in the bank to the extent of $8,000, a reputable mortgage broker and real estate holder in Philadelphia and he had no authority to make representations to anybody except the Metropolitan Life Insurance Company. He had no authority from the bank or building

(Testimony of O. S. Larson.)

company to deal with any of these contractors and any representations that Mr. Simpson made, neither Mr. Drury nor I ever gave him authority to do so. Exhibit 230 is the resolution of the building company with regard to a temporary loan Simpson was to secure. I did not have anything to do with the building except as a representative of the bank. [850½]

Receiver's Exhibit No. 230.

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS: That WHEREAS at a meeting of the board of trustees of the Scandinavian-American Building Company, a corporation, organized under the laws of the State of Washington, held on the 17th day of August, 1920, in the city of Tacoma, Pierce County, Washington, the president and secretary of said Scandinavian-American Building Company were, by resolution of said board of trustees of said corporation, authorized, directed and empowered to execute a power of attorney to G. Wallace Simpson of Philadelphia, Pennsylvania;

NOW, THEREFORE, and pursuant to the resolution of the board of trustees of said corporation, the said Scandinavian-American Building Company, a corporation organized under the laws of the State of Washington and having its principal place of business in Tacoma, Pierce County, Washington, has made, constituted and appointed and by these presents does make, constitute and appoint G. Wallace Simpson of Philadelphia, Pennsylvania, its

true and lawful attorney for it and in its name, place and stead to negotiate for a loan not exceeding $1,250,000.00, to be secured by first mortgage upon the following described real estate, situated in Pierce County, Washington, to wit:

Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T.,"

at a rate of interest not exceeding 6 per cent per annum and to mature at such time or times and in such amounts as to him, the said G. Wallace Simpson, shall be deemed proper and advisable, and upon concluding such negotiations, the said attorney in fact is hereby authorized and empowered to execute on behalf of this [851] company a formal

EXHIBIT 230 (Continued).

application for said mortgage loan.

Giving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as the said Scandinavian-American Building Company might or could do if personally present. Hereby ratifying and confirming all that said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF the said Scandinavian-American Building Company has executed this

instrument by its president and secretary thereunto duly authorized this 17th day of August, 1920.

SCANDINAVIAN - AMERICAN BUILDING COMPANY.

(Signed) By CHARLES DRURY,
President.

(Signed) By J. V. SHELDON,
Secretary.

State of Washington,
County of Pierce,—ss.

I, the undersigned, a notary public in and for the State of Washington, duly commissioned, sworn and qualified, do hereby certify that on this 17th day of August, 1920, before me personally appeared Charles Drury and J. V. Sheldon, President and Secretary, respectively, of Scandinavian-American Building Company, the corporation that executed the within instrument, and acknowledged that the said instrument was the free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned, and on oath stated that they were duly authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation. [852]

EXHIBIT 230 (Continued).

Given under my hand and official seal the day and year in this certificate first above written.

E. F. FREEMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma.

That was signed by Mr. Drury and Mr. Seldon.

(Testimony of C. C. Sharp.)
The bank never received the second mortgage bonds in accordance with the resolution.

Mr. REYNOLDS.—I assume that the testimony that Mr. Larson and the others have given in reference to the claims in this case, besides the one on trial should be taken as given in those claims.

The COURT.—It will be so understood unless objection is made.

Mr. OAKLEY.—As I understand the testimony, the testimony here relates to the one main issue, anyway. This is a question of priorities all the way through, on mortgages and *lirnd,* labor and material and contractors, so I think it ought to all go in for every person interested.

Mr. LANGHORNE.—That is the understanding I have been proceeding under. [853]

Testimony of C. C. Sharp, for Tacoma Millwork Supply Company.

C. C. SHARP, a witness called and sworn on behalf of the Tacoma Millwork Supply Co., testified as follows:

Direct Examination.

(By Mr. FLICK.)

I was practically the bookkeeper of the Scandinavian-American Building Company during the period of its existence, and have with me the records of the company from the time that any records were kept.

On March 31, 1920, $200 was deposited in the bank to the credit of the Building Company; on

(Testimony of C. C. Sharp.)

April 14, $25,000; that was a loan from the bank; May 20, 1920, $25,000. From my knowledge of the books it is a fact that the amounts received or held by the Building Company, correspond with the accumulating advances by the bank, practically entirely so, with the exception of $200 received from the sale of the old vault doors in the old building at the time it was wrecked. Otherwise the moneys which the Building Company received and held were moneys obtained by the Building Company on its notes given to the Scandinavian-American Bank.

I find on the books the stock purchase payment of June 25, recited on the books as a deposit by O. S. Larson, account capital stock, $200,000. That entry would be made from the deposit slip, which the bank would have.

Quite frequently there were overdrafts by the Building Company. On May 3, 1920, the Building Company had a balance in the bank of $287.89. The next deposit was May 21, 1920. On May 10, $5868.62 had been withdrawn from the Bank,—that was an overdraft. My records only show a note for $25,000 deposited May 21, 1920, during the entire month of May. On May 25, we started with a balance of $5,982.88. On June 4, there was an overdraft of $12,156.68. My records do not show any note as having been given up to the next [854] deposit known as the stock purchase. If the note was given, it ought to be recorded through the account department for entry, and if the note had been given, it would have occurred in the customary

(Testimony of C. C. Sharp.)

course on the note sheet of the bank. Now, in the period running from August, September and October, we started with a balance of $41,509.21, on August 8th, in the bank. On August 16, $29,322.47 had been withdrawn. On September 10, $34,391.41 had been withdrawn. That left a balance still in the bank September 11, $7,129.84; on September 20, it amounted to $36,218.51; September 22, $54,715.74, so that there was an overdraft of something like $47,000 on the 22d and on the 23d there was an overdraft of $79,153.55—on September 23 there was an overdraft of $79,153.55, less $7,152.10, making the actual overdraft something like $72,000. The records do not show any note given in that period of time in September for the carrying on of that overdraft. On October 14, we started with an overdraft of $118,401.78, and during the month of October the records do not show any note as having been given to carry that overdraft. On November 18, there was an overdraft of $7,429.06; no note was given to carry that. December 15, overdraft of $6,552.37; no note was given for that. When the bank closed the overdraft was $32,746.42.

Cross-examination.

(By Mr. OAKLEY.)

Defendant's Ex. 188, sheet No. 54920, under date of 1920, being $100,000, four months, note dated 11–8–22, 6%, shows, there was a loan for $100,000, four-month note, given to the bank at that time. Prior to that time (November 8, 1920) they had borrowed from time to time and they were paying off

(Testimony of C. C. Sharp.)
from time to time. There was $50,000 on June 25th that they owed the bank. [855]

Mr. LANGHORNE.—Was there a note given on June 25th?

WITNESS.—That represents notes given on April 14 and May 21. There were some small items of cash coming into the Building Company outside of those notes. I made checks in payment of invoices which came in against the Building Company. All the money which was received from the various sources was paid out by checks of the Building Company; all the money which came to the credit of the Building Company was paid out for labor performed or material furnished on the building.

Cross-examination.

(By Mr. STILES.)

A memorandum was turned over to me to show a deposit, by the note teller at the bank; sometimes the information came to me from the officers of the Building Company. I would not know of a meeting of the Board of Trustees or Directors of the Building Company. My office was down in the bank's office; part of the books were there. As a matter of fact the books were kept upon the 7th floor of the Argonne Building, not in the bank's office. I was part of the time in the bank and part of the time up there. The bank did not have offices on the 6th floor; that was the office of the architect of the building.

(Testimony of C. C. Sharp.)

Cross-examination.

(By Mr. FLICK.)

In regard to the $50,000 loan having been repaid, that that is the two $25,000 amounts that were paid June 25; undoubtedly that came out of the preceding note that was the only thing I had to pay it out of, was the money that came into the Building Company; the check was drawn simultaneously with the deposit of the purchase money of $200,000. Up to that time we had an overdraft. I never heard during the period up to December 30, near up to December 30, that this purchase fund for the stock was being charged back to the company as a loan; the books do not show it. I know that the check [856] was issued, but it never passed through the books,—it was prepared, but it never passed through my books. There is no note for that particular $200,000 purchase money shown on our books; no note of that kind ever came to me for entry on my books.

Cross-examination.

(By Mr. METZGER.)

Checks drawn by me were signed by Mr. Sheldon as secretary or Mr. Ogden as treasurer of the Building Company. Mr. Sheldon is one of the directors of the Scandinavian-American Bank, and also vice-president latterly; and Mr. Ogden is the Mr. Ogden who testified and who is cashier of the bank. As these overdrafts accumulated I usually called the attention of the directors of the Building Company to the fact that their account was over-

(Testimony of C. C. Sharp.)
drawn, in particular Mr. Sheldon or Mr. Ogden, and Mr. Drury if he happened to be in there. I do not know anything further about the providing of funds, save and except I received a memorandum showing that notes had been put through the Scandinavian-American Bank.

(Witness excused.) [857]

Testimony of Miss Edith Carlson, for Tacoma Millwork Supply Company.

MISS EDITH CARLSON, a witness called by Tacoma Millwork Supply Company, testified as follows:

Direct Examination.

(By Mr. FLICK.)

I was secretary to Mr. Frederick Webber while he was here as architect of the Scandinavian-American Building, and did his stenographic work for him, and while these building contracts were being formulated I was present at the Tacoma Hotel at the office of Mr. Webber and Mr. Simpson and Mr. Drury; that was the headquarters of the Building Company at that time.

I recall Mr. George Davis being at the office in connection with his particular contract. I would not want to say exactly, I do not know just what was said. I believe that the contractors understood that there was $400,000 on hand, by Mr. Drury's statement to them, I believe; they all understood I believe that amount was there; that is

(Testimony of Miss Edith Carlson.)

my recollection. In reference to the $600,000 mortgage, there was a statement made that it had been secured, but it was understood that the mortgage was just about to go through, the loan was just about to go through. I think that Mr. Drury made a statement that it was necessary that this lien clause should be in on account of the fact that they were to secure their loan through the Metropolitan Life Insurance Company, that the company demanded it. I know that the Davis (Tacoma Millwork Supply Company) contracts were changed; I do not know who demanded it, but I know that the contracts were changed. I think it was the understanding that all the contracts would have to remain alike. I got that understanding from conversation between contractors and Mr. Drury and several of the contracts in the office there; all the contractors were not in the office there, some of the contractors were not present at that time. I do not know the statement was made to all of them; I know it was made to some of them. I remember Mr. E. E. Davis being at the office and the representations [858] made to him were practically just the same as was referred to.

Cross-examination.

(By Mr. OAKLEY.)

I think that the same representation was made to almost all the contractors, the Washington Brick, Lime & Sewer Pipe Company, Ben Olson & Company. I believe that the lien clause was later struck out of the Washington Brick, Lime & Sewer

(Testimony of Miss Edith Carlson.)

Pipe Company contract; McClintic-Marshall Company had an entirely different contract. I heard a great deal of discussion, all of them in fact objected to signing the contract. To some of them the matter was explained satisfactorily and they went ahead and signed it; and others refused and had the clause stricken out. They represented that the loan was about to go through; I do not believe there was any representation that the loan had actually been made. I do not know very much about the first loan, that was before me. It was practically understood that was ready when they (Webber and Simpson) came out here, that the loan was just about to go through. I have not any correspondence on that. I refer to the loan they attempted to get through the second time Mr. Simpson was out here, after they found that the other loan was not going through. I did not hear any different representations made to one contractor than was made to another; the same representation was made to all. The clauses in reference to the waiver of lien were stricken out without Mr. Webber's knowledge; I think Mr. Webber and Mr. Simpson had returned east. I think when Mr. Webber was here that it was his understanding that the contracts were all to be alike with the exception of the McClintic-Marshall contract Mr. Drury knew about it. I did not say that Mr. Webber did not know about it until he returned to Tacoma. He did not know until he returned to his office in Philadelphia, and then he was apprised of it by wire or by letter.

(Witness excused.) [859]

Testimony of M. M. Ogden, for Tacoma Millwork Supply Company.

M. M. OGDEN, a witness called by the Tacoma Millwork Supply Company, testified as follows:

Direct Examination.

(By Mr. FLICK.)

As you requested, I have brought the loose leaf sheet showing the Two Hundred Thousand Dollars Stock transaction. This was carried under "Stocks and Securities" and the entry on June 25th, payment in full, stock subscription, Scandinavian-American Building Company, Two Hundred Thousand Dollars is correct. The little slip signed Ole Larson, is the notation that the general bookkeeper made, I presume he took it from the slip, he makes his entries from that. That is the only record I know of with reference to this transaction prior to December 30th. There is no record showing any change over from a purchase into a loan. No entry is carried on the $20,000. The only other reference that is the ticket at the end of the year showing the interest paid on this amount. Interest was charged at the end of the year, after the Bank Commissioner was there, about December 15th. The Bank Commissioner did not order us to change that over into a loan, I do not think he made any recommendations that I know of. The only thing I know in connection with this, is shown by the entry on those tickets. Whereupon the ledger sheet was admitted in evidence and marked Exhibit #234.

Exhibit No. 234.

(Flick.)

Exhibit 234, account No. 13, sheet No. 1—13, Stocks and Securities. This is the ledger sheet of the Scandinavian-American Bank and shows various Debits and Credits, entries among which is the following: debit entry:

June 25, 1920, Payment in full stock Sub. S. A. Bld. Co. $200,000. [860]

The check of the Scandinavian-American Building Company by Sheldon of $9,133.35 to the Bank for interest items, involving interest on the capital stock of the Scandinavian-American Building Company, 6% on $200,000 from June 25, 1920, to December 30, 1920, was evidently made under the authority of the letter accompanying it which was signed O. S. Larson, as follows: "Enter this voucher as real estate loan and hold until advance is secured on the mortgage, then charge same to account of the Scandinavian-American Building Company." Signed O. S. Larson, President. I do not know whether the Bank Commissioner ordered him to do that or not, that is Mr. Larson's signature. So far as the Bank's books are concerned, up to this particular time, December 31, 1920, they showed that this was being carried directly as a stock purchase, and the entry of December 31st is the first time any interest charge was made against it.

Whereupon Exhibit #235 was offered and received in evidence.

Exhibit No. 235.

(Flick.)

SCANDINAVIAN-AMERICAN BUILDING CO.
Tacoma, Wash., December 31, 1920.
To Scandinavian-American Bank,
———————, Dr.

In full for invoices as follows:

Interest on capital stock of Scandinavian-American Building Co.—6% on $200,000 from June 25, 1920 (date of entry) to December 31, 1920	$6,300 —
Interest on Drury Lot—6% on $65,000 from Sept. 25, 1920 to December 31, 1920	1,083 25
Interest on Banking House Investment—6% on $350,000 from December 1st to December 31, 1920	1,750 —
	$9,133.25

Distribution.

Interest—(Carrying charges). [861]

On the reverse side thereof is the check of the Scandinavian-American Building Company to the Scandinavian-American Bank for $9,133.25 signed by J. V. Sheldon, Secretary-Treasurer.

(On the letter-head of the Scandinavian-American Bank, attached thereto.)

"Enter this voucher up as real estate loan and hold until advance is secured on the mortgage,

(Testimony of M. M. Ogden.)

then charge same to account of the Scandinavian-American Building Company.

(Signed) O. S. LARSON,
President."

(Attached thereto on memorandum sheet:)

"Int. on bldg. Co.—Capt. Stock from 6/25-20 to Dec. 31, 1920—200,000 ....6300 —

Interest on 65,000 6% from Sept. 22—Dec. 31, 1920 100 days 1083.25

Interest 350,000 from Dec. 1 to Dec. 31, 1920 ....1750.00

52,510.68	466,934.15	6300.
385,761.48	438,272.16	1083.25
————	————	1750
438,272.16	28,661.99	———
	9,133.25	
	————	9133.25"
	19,528.74	

I never knew anything about the note signed by Mr. Drury and Mr. Sheldon which has been mentioned for $353,000 or $363,000, until after the bank was closed. I think it was in Mr. Haskell's possession the first time I saw it.

Cross-examination.

(By Mr. OAKLEY.)

The signature to Exhibit 235 is Mr. Larson's signature, and is a direction of the way in which to enter the voucher. That was given to the loan clerk and not to me. The figures on the yellow memorandum sheet attached thereto are in Mr. Larson's handwriting. I know nothing about this

(Testimony of M. M. Ogden.)

except what the exhibit shows. The notation under "distribution, interest, carrying charges" is in Mr. Larson's handwriting.

The item of $280,000.00 contained in Exhibit 226 represents the equity of the Bank in the two corner lots, less $70,000.00 mortgage. This was carried in familiar with the books of the bank closed. I am familiar with the books of the bank. Prior to June 25th, 1920 there [862] were two notes of $25,000.00 each of the building company's and $280,000.00 for the equity in the corner lots and $65,000.00 for the Drury lot, and I think there was an overdraft, so that exclusive of the $70,000 mortgage item there was $395,000.00 that the building company owed the bank, at least, on June 25, 1920.

Cross-examination.

(By Mr. STILES.)

When the Scandinavian-American Bank deed the two lots to the Scandinavian-American Building Company, Mr. Larson was handling the entries and I presume no change was made in the real estate holdings account for the reason that it was held waiting delivery of the bonds which were to be turned over to the Bank for the real estate but which were never issued. The bookkeeper was keeping the books in that way because there had been no instructions to change them.

Cross-examination.

(By Mr. HOLT.)

I arrive at the conclusion that the equity of the

(Testimony of M. M. Ogden.)

Bank in the two corner lots was $280,000 because the lots were held by the Bank at $350,000 and there was a $70,000 mortgage to the Penn Mutual. On the reports to the Bank Commissioner the lots were put in at $350,000 less the $70,000 mortgage, showing the Bank's investment at $280,000. I do not know what they cost the bank. [863]

Testimony of J. V. Sheldon, for Tacoma Millwork Supply Company.

J. V. SHELDON, a witness called by Tacoma Millwork supply Company, testified as follows:

Direct Examination.

(By Mr. FLICK.)

The #363,000 note exhibited here in court was found in the papers upon my desk at the time that the bank closed its doors. It had never been entered on any books of the bank building company, nor was it ever entered upon the books of the Bank. The note was signed by myself and Mr. Drury. The bonds had not been delivered to the Bank according to the agreement between the Bank and the Building Company, and the Bank was holding nothing at the time, that was the reason the note was executed, so that the bank would have something to show for the deed that they had made. The note never would have been used if the bonds had been delivered. If I remember correctly, it was for $350,000 with some interest on it. I do not remember the exact date the interest was figured.

(Testimony of J. V. Sheldon.)

There is a notation attached to the note, I think that will explain. The basic principal, not interest, will be exactly the same amount as the bank's portion of the second mortgage bonds. I do not know who discovered this note in the files when the bank closed; it was in my papers. I never at any time had a board meeting on this particular note, where the bank board made and accepted this note.

Cross-examination.

(By Mr. STILES.)

Exhibit 178 is the minute-book of the Scandinavian-American Building Company of which I was secretary. That book contains the minutes of all meetings of the board of directors and trustees of that corporation. [864]

Testimony of Gustav Lindberg, for Tacoma Millwork Supply Company.

GUSTAV LINDBERG, a witness called by Tacoma Millwork Supply Company, testified as follows:

Direct Examination.

(By Mr. FLICK.)

I was one of the trustees and the vice-president of the Scandinavian-American Bank during the year 1920.

In reference to the erection of the Bank Building, the first knowledge I had of it was when George Williamson called me up one time and wanted to see

(Testimony of Gustav Lindberg.)

me, and I went up there, and there was Mr. Drury; and he wanted to incorporate the building company. Mr. Larson was in the East and he had been negotiating for some money. I told him I had no time and I had no desire to serve or be an officer in this Building Company. They finally said this is only temporary and there will be new officers after three months, so I subscribed for one share. I was not present when Mr. Larson signed for the balance. During the period that the contracts were being let, I had nothing to do with them; I imagine Mr. Drury handled them he was very active. I was never present when any contract was signed. I signed the articles of incorporation. I was never requested to attend any meetings after that; I was not present when the stock of the company was purchased by the bank; the first I heard that Mr. Larson had the stock, was when I read it in the paper after the bank was closed. I never heard that the bank purchased the stock. I had nothing to do with the transaction relating to this building and the contract and the organization. I paid no attention to the building when it was going up and when the steel began to arise, and the other supplies. I left that to Mr. Drury. I think he was the most active. I knew that Drury was actively engaged on that building, and in the handling of contracts and so forth. I was present at the meeting December, 1920, when the matter of the loan that was made by the bank to the Building Company came up. I know there was a loan came

(Testimony of Gustav Lindberg.)

out [865] and there was money advanced that they had need of. As to what occurred at that meeting in substance I think Mr. Larson made the statement that the Bank Commissioner was advising him to keep going on that building. To finish that building, not stop the erection of the building. I do not remember the Simpson mortgage at that meeting; I never saw it. I cannot recollect that the Simpson mortgage, and its presence, as to where it was and what was being done with it, was discussed at that meeting. I recalled that there was a mortgage of $600,000. I do not say anything was said about it at that meeting. I do not recall that, but I know there was a mortgage. I heard of that, but I never saw the mortgage. I understand the $600,000 Simpson mortgage was for the building. It was my understanding that it was to be used for the final completion of the building; I heard Larson had the building financed, that was the purpose of forming this company; we had a loan of this money, and that was to be thereafter the building was finished; that I did not know until very late and then I heard that story. First we thought that the money was going to come, at least I thought the money was going to come just like any other mortgage. I would say about the latter part of last year I heard that this mortgage was going to be used for final completion, the latter part of 1920.

(Testimony of Gustav Lindberg.)

Cross-examination.

(By Mr. LUND.)

I never knew that the $600,000 mortgage had been assigned to the bank or that Larson had been instructed by the directors to go East and get that mortgage back. I never paid the $100 for a share of stock in the Building Company. I was never asked to. I endorsed a certificate for one share after the Bank was closed. I never had this stock in my possession. Mr. Haskell asked me to endorse it. [866]

Cross-examination.

(By Mr. OAKLEY.)

At that time I was a director in the Scandinavian-American Bank of Tacoma, had been since 1908 or thereabouts, continuously up to the time of closing. As I stated before, the financing of the building was made in the east and that is where I thought the money was coming from. I cannot recall that any statement was made that the Bank's money would not be used in the construction of this building; I never heard that. There was not at any meeting of the trustees which I attended, any authorization to Mr. Larson to subscribe for all of the shares of the Building Company's capital stock except four, for and on behalf of the Scandinavian-American Bank. I have no knowledge of the fact that on June 25, 1920, the Bank advanced the sum of $200,000 to the credit of the Scandinavian-American Building Company for the purchase of stock, nor that it was carried on the stock book.

(Testimony of Gustav Lindberg.)

Cross-examination.

(By Mr. LANGHORNE.)

I attended very few meetings of the bank. I was up at Lindberg running a mill a good deal of the time during the year 1920. I think I attended three meetings of the board of directors of the bank.

Cross-examination.

(By Mr. STILES.)

It was my understanding that Larson was going to get the money in the east. I do not remember what about the lots, but I suppose the understanding was the lots were to go in on the building. As I said before I had not any knowledge of this building until Williamson asked me to sign, and that Larson would get the money; that was all that was discussed there. The company was formed with the idea of getting money for this building, to put up that building. I did not understand then that the bank would have some stock in the building. I did not hear that the bank, after that, would have control of the building. There was no argument about conveying the Bank property to [867] the corporation at all. I understood they wanted to put up the building just like any other building. It did not enter my mind at all how the building company was going to have any right to build on these lots, and being the trustee of the bank I never inquired how it was that the building company was putting up a building on the bank property.

(Testimony of W. H. Pringle.)

Redirect Examination.

(By Mr. FLICK.)

I cannot tell you if I was or not, present at a meeting of the Bank December 10, 1920, as shown in the minutes of that date. I cannot recall any discussion about the Simpson mortgage. I do not believe I was in that meeting. [868]

Testimony of W. H. Pringle, for Far West Clay Company.

W. H. PRINGLE, a witness called and sworn on behalf of the Far West Clay Company, testified as follows:

Direct Examination.

(By Mr. HOLT.)

I was vice-president of the Scandinavian-American Bank of Tacoma in 1909 and '10 and continued until 1917. The Bank became the owner of the property at the corner of 11th and Pacific Avenue, the old Berlin Building, about the year 1909 or '10. The title was put in the name of Ole Granude, who was one of our directors at that time, and he subsequently conveyed the property to the bank. I think the bank paid about $275,000 for that property. I think there was a balance on the old mortgage of $65,000 and I think the Bank paid $210,000 besides that mortgage. The Bank subsequently conveyed it to Mr. J. E. Chilberg or J. E. Chilberg and wife. Mr. Chilberg was president of the bank. Mr. Chilberg then executed a mortgage on that property and conveyed it back to the bank. The bank got the money for that mortgage, or got the benefit of

(Testimony of W. H. Pringle.)

it. That was done so that in the reports of the banking department, or in public statements, it would not be necessary to show a liability of the bank. Subsequently the property was again conveyed to Mr. Chilberg or Mr. Chilberg and wife and an additional mortgage to the Puget Sound Mortgage Company of $50,000 was given by Mr. Chilberg after that he again conveyed it to the bank. The bank got the benefit of that mortgage. The reason for that transaction was just the same as previously. Later on the bank again conveyed the property to Mr. Chilberg and he then gave a mortgage to the Penn Mutual Life Insurance Company for $100,000. The first mortgage was given in this manner which we have referred to for $100,000 to the [869] Penn Mutual and then arrangements were made with the New York Life Insurance Company through Mr. Alfred, as manager of the Company, for them to take up that mortgage and renew it, and for some reason or other the New York Life Insurance Company could not go through with it and although the mortgage had been put on record, no money was obtained from them and they released the mortgage. In lieu of which we made arrangements with the Penn Mutual Life to have an extension made of the old $100,000 mortgage, which I think was done, and I think the records will show that condition to exist. That mortgage was still in existence, operating under the extensions when I severed my connection with the bank. It is understood that this mortgage about which witness testified is the mortgage that the Bank Supervisor is

(Testimony of W. H. Pringle.)

attempting to enforce in this case, being mortgage dated December 2, 1910. Fee No. 324,182, given by J. E. Chilberg and Anna M. Chilberg to the Penn-Mutual Life Insurance Company for $100,000. After getting this mortgage and during the time of my connection with the bank, the bank paid the interest. I do not recall whether we had commenced to make payments on the principal of this mortgage, but it is my recollection that there was an arrangement for extensions of the mortgage. There were arrangements made by which we were to pay, but whether we had commenced to pay them at that time or not, I do not remember. It was a mortgage on the bank property. They had to pay it if they wanted to keep the property.

Cross-examination.

(By Mr. OAKLEY.)

It was the intention of the Bank in these various transactions, to let the premises carry the loan and not the bank, October 27, 1915, is the date of the agreement for extension [870] of time of payment of the note and mortgage under this Penn-Mutual mortgage; the extension is signed, as to the Scandinavian-American Bank of Tacoma, by W. H. Pringle as president, attested by E. C. Johnson as secretary, with the corporation seal, and as to the Penn Mutual Life Insurance Co. by George K. Johnson, its president. It contains this provision:

> "As part of the consideration to the Penn-Mutual Life Insurance Company for the granting of the mortgage extension to *tome* of pay-

(Testimony of W. H. Pringle.)

ment and change in the rate of interest, the undersigned Scandinavian-American Bank of Tacoma hereby request that the extension of time be granted on the terms specified in this agreement and hereby consents to said extension of time and change in the rate of interest, and acknowledges that said mortgage and said extension thereof are an absolute first lien on said premises, superior in every respect to any interest said Scandinavian-American Bank of Tacoma may have in said property or may hereinafter acquire therein; it being understood however, that Scandinavian-American Bank of Tacoma does not itself assume any personal obligation to pay the indebtedness secured by said mortgage. The only personal obligation to pay said indebtedness secured by said mortgage being Chilberg and wife."

That was the understanding I had, that was the understanding at the time, of the Bank Officials in reference to this matter.

Redirect Examination.

(By Mr. HOLT.)

The bank agreed to it. The bank caused it to be inserted, so that the bank did not have to publish it as an obligation of the bank. The bank paid this interest, and expected to pay the principal. The correspondence with the Penn Mutual was between myself and their agent here in Tacoma. We would have had to have paid the mortgage so as to protect our property. We got the benefit of this money, the property was good for it all the time. [871]

Testimony of J. E. Chilberg, for the Receiver.

J. E. CHILBERG, a witness called by the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at Port Madison, Washington, and was formerly president of the Scandinavian-American Bank of Tacoma, and also connected with the Scandinavian-American Bank of Seattle. At the time this matter of the financing of a new building known as the Scandinavian-American Building Company, Tacoma, came up, I was connected with the Scandinavian-American Bank of Tacoma as President and Director. That was in 1918 and 1919. At that time I told Mr. Larson that the Scandinavian-American Bank of Seattle would take a portion of the second mortgage bond issue. I think the total was to be about $150,000 or thereabouts. A first mortgage loan was to have been obtained and then the second mortgage bonds or their equivalent and then stock. I understood that the funds of the Scandinavian-American Bank of Tacoma might possibly be used to take a portion of the second bond issue. The intention was to sell those bonds off. The ultimate intention was to dispose of whatever interest the bank may have had in the old Berlin building. I was going to get the building entirely out of the bank as an asset.

The provision in the extension, Exhibit 245, to the

(Testimony of J. E. Chilberg.)

effect that J. E. Chilberg and Anna Chilberg, expressly agree to pay said principal sum and to pay said interest and to comply with all terms, provisions and conditions of said note, was inserted so that the bank would not be liable for that mortgage. Of course, originally this property was obtained, so as to provide, among other things, a permanent home for the Scandinavian-American Bank of Tacoma. The Scandinavian-American Bank did not want to invest a large sum of money, or a larger [872] sum of money than necessary in the property, that is, the building, nor did they want to publish their liability for a mortgage or mortgage note. The property was deeded to me and I assumed the liability with my wife, and issued the note, gave the mortgage, and deeded it, subject to that liability, to the bank. The Bank then became the owner, as I understand it of the equity over and above the mortgage. There was no obligation on the part of the bank to pay me on account of that mortgage and I never paid one cent to the Penn Mutual either principal or interest. Had the bank defaulted, I would have had,—I thought the property was worth it,—I would have stepped in and paid it myself and took the property over, the same as any other property I might have bought or sold, subject to mortgage. The time of the payment of that mortgage was extended according to the agreement.

Cross-examination.

(By Mr. LANGHORNE.)

I was president of the Scandinavian-American

(Testimony of J. E. Chilberg.)
Bank of Tacoma until January, 1920, when the election of officers was held. It was prior to the time I ceased to be president that the officers of the Scandinavian-American Bank of Tacoma conceived the idea of putting up a new building. I went east in the fall of 1919 to attend a United States Chamber of Commerce Directors' meeting and Larson met me there and asked me to see what I could do about financing the new bank building, and we were in New York together, but I did not go there to negotiate that loan. While there I telegraphed to Frank Hunter and got the address of G. Wallace Simpson, who had negotiated a loan on the Bailey building of Seattle, and asked Simpson to come over to Philadelphia to meet us. I introduced him to Mr. Larson as a broker who could probably [873] get the loan and Mr. Larson started negotiations with him then. No loan was secured on that trip, however. I knew that the officials of the Metropolitan Life Insurance Company had agreed to make a loan of $600,000 on the building. I think it was increased to $650,000 afterwards. I did not know what was the contemplated cost of the new building at that time. I do not think I ever did. It was changed frequently. I won't say that I knew it would cost considerably more than $600,000. The original plan of financing the building which we talked over in Seattle, was that this building was to be financed, by first and second mortgage loans. The first mortgage loan was to be the Simpson or Metropolitan Life Loan if we could get the money

(Testimony of J. E. Chilberg.)

from them. We did not know where we would go to get it. I knew the first of January that there had been a $600,000 loan agreed upon, I don't think there was a question of doubt in anybody's mind. I do not know the date of it. Letter marked Exhibit 202 dated August 6, 1919, is my letter I said we will take some of the second mortgage bonds, give us one-half or two thirds. We never did that, it was never offered to us, as a matter of fact. I never knew that the Scandinavian-American Bank had to put up any money on the building to carry it along. I knew that they never had gotten any money from the Metropolitan Life Insurance Company. I did not know of the Simpson mortgage at that time. The Metropolitan Life Insurance Company mortgage, I do not remember the date of that, but they had agreed to lend either $600,000 or $650,000 when the building was completed. There was supposed to be provided with which I had nothing to do, an interim loan plus these bonds, to take care of the building until it was completed. [874] I had nothing to do with it then. I was not in at the finish, I did not take any active interest whatever in the construction of the building or in its financing. I was not in a position to take any active interest in it, as I was neither an officer nor a director in the bank in 1920. I did not make any inquiry in 1920 as to whether they were going to issue the second mortgage bonds on the building. I was not interested in it.

(Testimony of J. E. Chilberg.)

Referring to deed, I never paid the Scandinavian-American Bank of Tacoma anything for that deed, did not rent the building to them after they deeded it to me. Had nothing more than the title that was issued to me and I gave it back to the bank within a few days. The proceeds were applied on the mortgage purchase price. I never spent any of the money. I was interested in the bank. I never got any of the proceeds of that mortgage money. It went to pay just what I have said, the old first mortgage and part of the purchase price.

Cross-examination.

(By Mr. STILES.)

The plan of financing was a first mortgage of $600,000 or thereabouts, and a second mortgage and stock. This stock was expected to be sold. The original plan was to sell it to anybody that would buy it. I suppose somebody would subscribe it as those things are usually done until it could be placed. I was not there when it was subscribed by Mr. Larson. I do not know whether it was done. I have never seen the document. I do not know when it was done. I was still president on the 24th of November, 1919. I do not know that I was one of the directors of the building company at that time. I do not know I was ever a director of the building company. I was director of the bank. My signature appears on exhibit [875] 178 at the foot of the page, which purports to contain the original articles of incorporation. I was apparently one of the incorporators. I signed these ar-

(Testimony of J. E. Chilberg.)

ticles. It appears I was named as one of the directors. I knew at the time I signed these articles of incorporation what I was signing. I might have been present at the meeting of the board of trustees of the Scandinavian-American Building Company on the 25th day of October, 1919 (as it recites in the minutes), but I do not remember it; I have not any reason to doubt what is written there. It was probably intended that I should be there. I am hardly able to swear I was not, because I do not know where I was on that day. But this stock is subscribed by others than myself, and but one share by me and I never qualified, and I am enough of a corporation man to know I should have been if I participated in the meeting.

> "Q. Now, being one of the directors and having been present at that meeting as it recites, you say now you do not know anything about what the plan of operation was going to be for financing that building.
>
> A. I have said all I have to say as to what the plan was."

Cross-examination.

(By Mr. HOLT.)

I did not get any of that $50,000 that was borrowed from the Puget Sound Mortgage Company, it was not borrowed for my use or my benefit and it was never paid by me. No part of the Penn Mutual mortgage was paid by me, nor any interest on it, I never expected to pay it, if any demand was made,

(Testimony of J. E. Chilberg.)
certainly not. The bank might have sold it to somebody else and there would have been a default. If there had of been a default, I had to pay it; if there was not any default, I did not. I heard somebody say here that there is a proceeding in this court for the foreclosure of that mortgage; I have not been [876] made a party to that suit or notified of the pendency of it. I certainly never had any understanding with Mr. Duke or Mr. Haskell that no judgment would be sought against me and no recourse would be had against me, and it was never mentioned to me.

Cross-examination.

(By Mr. FLICK.)

I do not think that the Metropolitan Life Insurance Co. gave a commitment to the bank. (Counsel handed witness a letter.) This is addressed to the Building Company. I was told that and I think I have probably seen this commitment before. (Referring to another paper.) I never saw this commitment—the one of November 7, known as Exhibit 177. I heard it had been increased $50,000. I may have seen this, but I do not remember. I do not remember hearing that the company wanted an individual bond from all the directors to the amount of $100,000, until the loan had been reduced to $500,000. It was my understanding that $600,000 was to have been the first mortgage on the property, and probably there would be a second mortgage sufficient to take up the cost of this building. It

(Testimony of J. E. Chilberg.)

was understood that out of the second mortgage bonds or any other sum, the mortgage of the Penn Mutual was to be paid so as to leave it entirely as a first mortgage of $600,000. I never heard that $600,000 was to be sacredly kept for the final completion of the building. The $600,000 was to be a first mortgage on that building; when the building was completed and free of liens, the Metropolitan would make it. What we did with the money or what was done with it, made no difference. We could not use that $600,000 for material and work because we could not get it until it was finished. We could borrow money if anybody would lend it to us. [877] The builders would not accept certificates. It was not contemplated that the $600,000 was to be used for anything except this building, borrowing the money for the purpose of the building.

Speaking of the $70,000 mortgage of the Penn Mutual it was not merely for the purposes of bank bookkeeping. It was so that that obligation on the part of the bank would not exist, and it did not exist, at least that is what everybody who advised them told me. I did not expect the bank to pay it unless they wanted to. If they wanted to quit, I would have had to take the property and pay it myself. I have handled a great deal of this mortgage and equity business and whenever an equity has been offered and sold, the mortgage purchaser was expected to pay until he got tired. If he quit, the recourse went to the other fellow. I assumed that

(Testimony of J. E. Chilberg.)
obligation as an accommodation to the Scandinavian-American Bank and its stockholders. That equity did not belong to me.

Redirect Examination.

(By Mr. OAKLEY.)

I do not remember being a subscriber to the capital stock of the Building Company and on the page of the minute-book (Exhibit 178) where the trustees have qualified by taking an oath before a notary public, it is not signed by me. I do not know of any authority having been granted to O. S. Larson by the bank to make any subscription for $199.600 for and on behalf of the bank and to bind the bank. I was president of the bank at that time. I would not say that I know he either had or had not been. I was not present at any meeting where such authority was granted. [878]

Recross-examination.

(By Mr. STILES.)

I was president of the bank at that time, I was going out and I had ten shares of stock, I evidently signed the articles of incorporation of the Building Company which was organized as part of the plan they had for furthering financing and construction of the building. Mr. Larson was Vice-president and manager of the Scandinavian-American Bank of Tacoma, I do not know whether he was any more active than Mr. Drury in furthering this building project, but he was certainly active, doing the best he could, I think I never saw Larson's subscription

(Testimony of J. E. Chilberg.)

until to-day. If I had been at that meeting, I would have signed that subscriptions and I would have qualified as a director. I am unwilling to commit myself on the plans that other men's minds have laid in my absence. Mr. Larson was doing these things and these gentlemen over here, and I was not; in fact, I was not even in Seattle, but very little at that time. I executed these articles without doubt, and had I been at the meeting, I would have signed up and had my share of the stock.

Referring to Exhibit 177, dated November 7, 1919, from Metropolitan Life Insurance Company, containing a proposition to loan $600,000, I cannot tell who put it in to the mind of the officer of the corporation who wrote that letter, Mr. Walter E. Stabler, to address it to the Scandinavian-American Building Company which did not exist at that time. Mr. Stabler is a very able business man and manages the mortgage loans for that great big company, and I am only guessing at it, but the probability is that he was informed that such a corporation was to be formed for this purpose. I never saw Mr. Stabler when I [879] was with Mr. Larson in New York, nor was the loan consummated at that time. I think it was later consummated. I do not know whether there were other letters on that subject. [880]

The signatures appearing on the note marked Exhibit No. 243 of the signatures of myself and my wife, and the note was delivered to the Penn Mutual Life Insurance Company with the mort-

(Testimony of J. E. Chilberg.)

gage, which is marked Exhibit No. 242, which is the original mortgage.

Exhibit No. 242 is the original mortgage dated September 2, 1910, signed by J. E. Chilberg and Anna M. Chilberg, his wife, covering Lots 11 and 12 in block 1003, Map of New Tacoma, to secure the sum of $100,000. The endorsement on the back thereof, shows that it was filed with the Auditor of Pierce County, Washington, September 23, 1910, fee number 324812. It is the original of Exhibit 326, heretofore set forth in full.

Receiver's Exhibit No. 243.

FIRST MORTGAGE NOTE.

No. 622 $100,000.00

Tacoma, Washington, September 2d, A.D. 1910.

Without grace, for value received, we, jointly and severally, as principals, promise to pay to the order of

Penn Mutual Life Insurance Company, of Philadelphia,

the principal sum of one hundred thousand dollars with interest thereon from the date hereof until maturity at the rate of 5 per cent per annum, and from maturity until paid at the rate of twelve per cent per annum, payable semi-annually, on the 1st days of March and September in each year, according to the tenor of ten coupon interest notes of even date herewith and hereto attached, both principal and interest payable only in United States gold coin, of the present standard of weight and fineness, at the office of Penn Mutual Life Insur-

ance Company, at Philadelphia, Penna., with New York exchange.

If any default shall be made in the payment of the principal or interest hereof, or any part thereof, as above provided, when the same shall become due or payable, or if any default shall be made in the performance of any of the agreements or provisions contained in that certain mortgage made, executed, and delivered to secure the payment of this note, time and the strict performance of all and singular the agreements and provisions contained in this note, and in said interest notes, and in said mortgage being agreed to be material and of the essence of the same, then said principal sum hereof and all accrued interest and all sums due or payable under said mortgage shall, at the option of the holder hereof, thereupon and without any notice or demand become at once due and payable, with interest thereon from said date until fully paid at the rate of twelve [881] per cent per annum.

EXHIBIT 243 (Continued).

No waiver by the holder hereof of any default on the part of the makers hereof or of any person or persons liable or the payment hereof in the performance of any of the terms or provisions of this note, or any of said interest notes, or of said mortgage shall affect or impair the full force of said terms or provisions as to other, different or future matters, acts or transactions. All parties to this note, and each of them including makers, endorsers, sureties, guarantors, and all persons in any manner liable for the payment of the same, or any part

thereof, including interest or of the amounts due under said mortgage, hereby waive presentment or demand for payment, protest, notice of nonpayment, and notice of any default whereby this note may become or may be declared to be at once due or payable, and hereby expressly waive any release or discharge from any extension of the time of payment hereof, or from any other cause.

In case any default is made in the performance of any of the terms or provisions of this note, or of any of said interest notes, or of said mortgage, and this note is placed in the hands of an attorney for collection, the makers hereof and all said parties above referred to, jointly and severally promise to pay five per cent, of the amount due as an attorney fee, if paid without suit, and if suit shall be commenced then said makers, and said parties, jointly and severally agree to pay ten per cent of the amount due as an attorney fee, and agree that in case suit shall be prosecuted to judgment, said attorney fee, equal to ten per cent of the amount then due, shall be included in said judgment, and said makers and said parties hereby jointly and severally agree that said sums are reasonable. Any judgment rendered on this note shall bear interest at the rate of ten per cent per annum from the date thereof until fully paid. Said makers and said parties above referred to jointly and severally agree that in the event of a suit to enforce the collection of this note, or of any of said interest notes, or to procure a foreclosure of said mortgage, a deficiency judgment may be entered against them jointly and severally, and may

be satisfied out of any property belonging to them, or to any of them. Said makers and said parties above referred to jointly and severally agree to pay, before delinquent, any and all taxes that may be assessed against said note, said interest notes, or said mortgage, or against the holder of the same on account thereof.

(Signed) J. E. CHILBERG.
(Signed) ANNA M. CHILBERG. [882]

EXHIBIT 243 (Continued).

Endorsed on the back thereof is the following:

Pay to the order of F. P. Haskell, Jr., as special deputy Bank Commissioner in charge of liquidation of Scandinavian American Bank of Tacoma, without recourse on The Penn Mutual Life Insurance Company in any event.

THE PENN MUTUAL LIFE INSURANCE CO.
(Signed by) SYDNEY A. SMITH,
Secretary.

8/30/16 Received on account of principal of within notes—$10,000.00.

8/29/17 Received on account of principal of within note—$10,000.00.

9/ 3/18 Received on account of principal of within note—$ 5,000.00.

9/ 2/19 Received on account of principal of within note—$ 5,000.00. [883]

Testimony of James R. Thompson, for the Receiver

JAMES R. THOMPSON, a witness called by the Receiver, being duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

My name is James R. Thompson. I live at Steilacoom Lake, a suburb of Tacoma. At one time I was connected with the Scandinavian-American Bank of Tacoma. I was director and stockholder during the year 1919. I resigned some time in December. I gave a written resignation some time in December, 1919. I was in the hospital at the time and did not keep a copy of it. I had an attack of heart failure, and since that time was not officially connected with the bank in any shape or form. I remember being in the East and meeting Mr. Ole Larson, vice-president of the bank at that time. It was September 1919. I met Mr. Williamson and Mr. Drury and Mr. Larson at the Plaza Hotel, and discussed with them the building proposition of the Scandinavian-American Bank. My brother was a director of the Metropolitan Life Insurance Company and I told him the situation of the building, its desirability as real estate, and really that was about all the connection I had in regard to the loan. Merely informed him as to that, as to the value of the corner. I did not meet Mr. Walter Stabler, the comptroller. I had a talk with Mr. Larson as to whether or not any of the funds of the bank were

(Testimony of James R. Thompson.)

to be used in the construction of this new building of the Scandinavian-American Building Company. Some time during the summer of 1919 I wished to have an assurance by Mr. Larson that the building had been financed or would be financed, would be financed, rather than had been financed,—independently of the bank, and that none of the bank's funds would be used. That impression was carried in my mind all the [884] time I was a director of the bank, that the financing of the new building would be done outside of the bank. I continued as a stockholder during 1920, but I did not know anything of the affairs of the concern, I was very sick. During that year I did not know practically anything that was going on. I never did qualify or accept the position of trustee of the Scandinavian-American Building Company. I never knew I was a director until I read it in the paper long afterwards, after the bank had closed I found it out, during 1921 I read it. I did not attend any meetings, or have any information that O. S. Larson was authorized by the bank to sign for $199,600 worth of capital stock of the building company, never heard of it. I would not be in a position to answer the question as to whether I ever heard that the Scandinavian-American Building stock was bought by the Scandinavian-American Bank, because I did not keep track of anything during 1920 at all. I was very sick. In fact, I was stricken in November, 1919, and kept business out of my mind in every way, shape and form.

(Testimony of James R. Thompson.)

Cross-examination.

(By Mr. LANGHORNE.)

I returned from New York the latter part of September, 1919. I knew at that time that the bank contemplated the erection of a building. It was my impression when I was in New York that this new building was to be finished without debt of the bank. Mr. Larson told me that. I could not tell you positively whether Mr. Drury was present. I think Mr. Williamson was present when I asked the direct question of Mr. Larson, in Tacoma. At that time I did not know what the building would cost, I had no idea. There was a plan submitted in the New York meeting from Strauss & Company for financing the building. There was present at that meeting, [884½] Mr. Williamson, Mr. Drury Mr. Larson, Mr. Webber, Mr. Simpson and myself. That plan was turned down unanimously, not any disagreement of any kind whatever. My remembrance of that occasion was that the terms were read and, discussed and pronounced preposterous and turned down and there was no division of opinion on the part of any member present. It was a larger sum of money than the Metropolitan loan, I think. Mr. Webber furnished an estimate for a fifteen-story building and a twelve-story building, and I heard the discussion as to the cost. It was largely in excess of $600,000. The actual fact is these plans were all preliminary. When it came to the letting of their building plans, or the actual plans, I do not know a thing about it. The plans I saw were preliminary. They were not final.

(Testimony of James R. Thompson.)

Cross-examination.

(By Mr. LUND.)

August 17, 1920, I was not present at the meeting of the Building Company trustees, as recited in the minutes; I was sick at home.

In reference to the talk with Mr. Larson, I am only giving you my impression that four or five different conversations placed firmly in my mind that Mr. Larson's schemes of finance contemplated erecting this building without taking any money of the bank for doing it, that is erecting the building on borrowed money. I did not inquire as to exactly how he proposed to accomplish this. He did not fully explain the method, except this first plan of Strauss was really the only deal I heard and it was turned down. [885]

Direct Examination.

(By Mr. OAKLEY.)

I attempted to find out how they were going to finance this building, they not having any of the bank's money in there. One of my hazy impressions that was given to me was that there would be a lease with the Scandinavian-American Bank which would take care of the loan that they would get from the outside. I got that impression from Mr. Larson. I am satisfied that Mr. Larson did run the whole matter; nobody else had much to do with it. I resigned in 1919, and in December. Up to that time he was running it. [886]

Testimony of J. V. Sheldon, for Tacoma Millwork Supply Company.

J. V. SHELDON, a witness called by the Tacoma Millwork Supply Company, testified as follows:

Direct Examination.

I was secretary of the Building Company and as secretary I quite frequently conferred with Mr. Drury and Mr. Larson about the building. In transferring this property from the Bank to the Building Company, I believe there was an agreement to issue $750,000 of second mortgage bonds. When the contracts were signed up, the $600.00 was to be used in completing the building; the commitment we had provided that the $600,000 was for final completion of the building. I believe that later on the mortgage was made to Simpson to take and raise funds and the Metropolitan in the meantime agreed to accept the assignment of Mr. Simpson. (Statement of Facts, p. 873) The $600,000 I believe was a first mortgage. I did not know right then how the Penn Mutual mortgage was going to be handled; I do not know that out of the second mortgage funds we were to pay this Penn Mutual mortgage.

Direct Examination.

(By Mr. OAKLEY.)

I first became a stockholder of the Scandinavian-American Bank of Tacoma in January, 1920. Prior to that time I was living at Nome, Alaska, where I was engaged in the banking business. I bought

(Testimony of J. V. Sheldon.)

100 shares of the new issue of the stock of this paying $125.00 per share, par value $100.00. Prior to that time I had owned ten shares of the stock of this bank, and afterwards sold them before I bought the 100 shares. I came there with a promise of a position in the bank, from Mr. Larson and Mr. Lindeberg of San Francisco, and it was upon that promise that I bought the stock. I was elected vice-president in January, 1920. I went to Nome and returned from Nome to Tacoma in August, and came back to the bank in September 1919, and [887] continued thru the year. I was assistant cashier in 1919, and then made vice-president on January 17th, 1920, and held that position up to the time the bank closed; I was also one of the trustees of the bank from January 17, 1920. During the year 1920 the trustees of the bank were Mr. Larson, Mr. Lindberg, Mr. Frank Lamborn, Dean Johnson, Charles Drury, George Williamson, and myself. Mr. Dean Johnson became connected with the bank in January, 1920. He held the position of vice-president and became a stockholder. He left Tacoma in December, 1920, whether he resigned or not I do not know. In my capacity as vice-president I handled the new accounts that came in and worked generally with Mr. Ogden on the front counter, which consisted of passing upon loans, taking up matters of credit, just the general work of the front counter. I have been in the banking business since 1907, and was familiar with the details of the banking business at that time (1920).

(Testimony of J. V. Sheldon.)

I was familiar with the details in reference to the building of the building. The first knowledge I had in reference to that business was in the spring of 1919, before I left Nome, when I was told by Mr. Larson that a building was to be built, costing seven or eight hundred thousand dollars; that could all be financed outside of the bank. When I came back in the fall of 1919 they were going to go ahead with the building. I was secretary of the building company. I had a conversation with Mr. Larson in reference to financing this building in the spring of 1920. I was told that the building would be financed entirely outside of the bank funds; that the plan was to place a first mortgage upon the property, they had a commitment from the Metropolitan Life Insurance Company for $600,000 second mortgage bonds were to be issued for the difference between that and the cost of the building, that the second mortgage bonds were to be sold; that the Seattle Scandinavian-American Bank was to carry a substantial [888] portion; a portion of these bonds were to be given to the directors, and an attempt was to be made to sell some, and it might be possible that the bank would have to carry a small amount of them, I first learned that the bank had advanced money to the building company in April, 1920, when I executed a note as secretary of the Scandinavian-American Building Company which was turned into the bank, and I knew it was in the files. I think the amount of that note was authorized by the Loan Committee. I made com-

(Testimony of J. V. Sheldon.)

plaint about the advancing of the bank's money to the credit of the building company, to Mr. Larson and Mr. Drury, I didn't hear any of the other directors make complaint to Mr. Larson. I had a conversation with Mr. Larson and other directors of the Bank in reference to the bank taking the assignment of the $600,000 mortgage, a short time prior to Oct. 7th, 1920. Mr. Drury and myself had discussed the matter. I discussed it with Dean Johnson, I do not recall discussing it with Mr. Larson until just prior to his departure for the east, at which time he took those papers east with him and told me he was going to get an assignment of the mortgage from Mr. Simpson to the bank; the purpose of that assignment was for the protection of the bank for moneys that they had advanced. That was the statement of Mr. Larson. That question was not discussed at a meeting of the board of trustees, but between ourselves as individuals or for instance Mr. Drury and I had talked of it and Mr. Dean Johnson had talked of it. In fact Mr. Drury is the man that came to me and first mentioned the matter and he was the one that insisted on taking up the assignment.

"(By the COURT.)

Q. You heard these minutes of 190 that recited Mr. Thompson's being present?

A. Yes, sir.

Q. At that meeting?

A. Yes, sir. [889]

(Testimony of J. V. Sheldon.)

Q. Were those minutes kept in your handwriting?

A. I wonder if I can see them, please. Are they typewritten or signed by myself?

Minute-book of the Building Company was exhibited to the witness.

Q. Have you any explanation as to how his name came to be there?

A. I am under the impression, in fact I am pretty sure, that I was not present at this meeting; but that these minutes were handed to me afterwards and I signed them."

Receiver's Exhibit No. 248.

(Notation by Witness.)

September 24th, 1920.

Mortgage—Building Company to Simpson.

Declaration of Trust, Simpson to Building Company.

Power of Attorney, Building Company to Simpson.

Note, $600,000 Building Company to Simpson dated 3/10/20.

Above given O. S. L. 9/24/20—S.

(On Scandinavian-American Bank letter-head attached thereto:)

Received of J. V. Sheldon, Secretary of the Scandinavian-American Building Company the following documents:

1. Mortgage of the Scandinavian-American Building Company in favor of G. Wallace Simpson in the sum of $600,000 dated March 10, 1920.

(Testimony of J. V. Sheldon.)

2. Mortgage note of even date and tenor.

3. Declaration of trust executed by G. Wallace Simpson dated on the 17th day of August, 1920.

4. Copy of power of attorney from Scandinavian-American Building Company to G. Wallace Simpson, dated August 17th, 1920.

(Signed) O. S. LARSON.

(Scandinavian-American letter-head attached thereto.) [890]
6/28/1920.

MEMORANDUM FOR MR. SHELDON:

Where are the original papers in the Bank Building case:

1st. The mortgage to G. Wallace Simpson which was put of record at the Court house on the approval of the attorneys for the Metropolitan Life Insurance Company.

2d. The mortgage note which was executed in connection with that mortgage drawn by Mr. Oldham, representing the Insurance Company.

I wish you would keep these papers in a safe place ready to be delivered when the funds are to be turned over.

Very sincerely yours,

(Signed) O. S. LARSON.

One of these is a memorandum addressed to me by Mr. Larson, under date of June 28th; the other is a receipt to me from Mr. Larson, under date of September 24th, referring to the building company papers. The paper on top is a memorandum that I made of the same thing. That refers to this

(Testimony of J. V. Sheldon.)

letter, this receipt of September 24th. I had possession of these instruments mentioned in the letter and kept them in what we call a special file in the vaults at the bank.

Cross-examination.

(By Mr. LANGHORNE.)

I had possession of that Simpson mortgage in June, 1920; I delivered those papers to Mr. Larson at that time. He told me he was going to take them east and get an assignment from Mr. Simpson to the Bank. Subsequently that assignment came into the hands of the bank. I think I had seen it. The records of the note department show that the assignment was brought into the bank as security for that money. Those records are in evidence. Defendant's Exhibit 187, being page 233, under date of December 9th, 1920, $200,000 item on the bank of which are certain writings, shows the collateral or [891] security for the note that is set forth on the other side; note of the Scandinavian-American Building Company dated March 10th, 1920, $600,000 to G. Wallace Simpson, etc. That part of it (indicating) is in the handwriting of Mr. Samuel Morse; also the two last are in the handwriting of Mr. Geiger, Mr. Morse being the note teller. I do not know the exact amount, but the records will show, how much the building company was indebted to Scandinavian-American Bank in October 7th, 1920. The paper handed me is a note of the Scandinavian-American Building Company in favor of the Scan-

(Testimony of J. V. Sheldon.)

dinavian-American Bank of Tacoma $363,825.00 made up of the principal sum of $350,000 together with interest due from and to certain dates. That memorandum was attached to the note while in my possession, said memorandum reading as follows:

> "Amount of bonds to be delivered pursuant to resolution and agreement, February 10th, 1920, $350,000, interest 6% from January 10th, 1920, to October 10th, 1920, $13,825."

The bank deeded the property to the building company under agreement that second mortgage bonds would be delivered to the amount of $350,000. The agreement was not carried out, the bank did not have anything to show. They deeded the property away. We executed this note to protect the bank as far as we could. This note was kept among my papers on my desk. We had little trays that we had various papers in on our desks. These were moved into the vault each night. That note was in my tray. The note was dated October 7th, 1920. The note never passed from my possession into the possession of the note teller, no records were made of the note on the bank's books.

Redirect Examination.

(By Mr. OAKLEY.)

I remember an item of June 25th, 1920, being in reference to a stock transaction of the Scandinavian-American Building Company. I first learned of that transaction after June 25th. On June 25th, I believe I was in Portland. I either

(Testimony of J. V. Sheldon.)
came from Portland or the first [892] time I found that the building had obtained a credit, I wanted to know where the credit had come from and I proceeded to look it up and that is the entry I found. I mentioned it to Mr. Larson afterwards. As a trustee of the bank I was not at any time consulted in reference to the purchase of this stock of the Scandinavian-American Building Company, and had no knowledge of that transaction prior to the time I discovered it myself a few days after June 25th, 1920.

Cross-examination.

(By Mr. FLICK.)

After discovering it I did not make any effort to rectify it by calling a board meeting. I do not think the matter was taken up officially. It may have been discussed. There was nothing done about it. I believe there was an agreement between the building company and the bank for the delivery of the bonds. I think it is here in evidence, Exhibit 184, bears my signature, and the bank at all times had this exhibit, and the certificate provides for six per cent interest, that is why I computed the interest on this $350,000 at 6%. The note and attached certificate, being Exhibit 249, and Exhibit 184 bear upon exactly the same thing.

Receiver's Exhibit No. 249.

(Memorandum Attached to Note.)

Amount of bonds to be delivered pursuant to resolution and agreement of February 10, 1920	$350,000
Interest at 6% from February 10, 1920 to October 7, 1920	13,825
Total	$363,825

$363,825

Tacoma, Washington, October 7th, 1920.

On demand after date, without grace, at 12 o'clock noon, for value received Scandinavian-American Building Company, a corporation, promises to pay to the order of the Scandinavian-American Bank of Tacoma, at its banking house in the city of Tacoma, the sum of Three hundred sixty-three thousand eight hundred twenty-five Dollars in Gold Coin of the United States of present standard weight and fineness, with interest thereon at the rate of six per [893] cent per annum from date until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid at the rate of twelve (12) per cent per annum. In case default is made in the payment of this note and it shall be placed in an attorney's hands for collection, we agree to pay five per cent of the amount then due as attorney's fees if paid before suit is commenced; but if suit be commenced to collect

this note or any part thereof, we agree to pay ten per cent of the amount then due as attorney's fees; and in case suit is prosecuted to judgment, we agree to pay as attorney's fees such amount as the Court deems reasonable, and such amount shall be included in the judgment, and such judgment shall bear interest at the rate of ten per cent per annum.

All parties to this note, including guarantors, sureties and endorsers, hereby severally waive presentment, protest, notice of nonpayment, or any release or discharge arising from any extension of time of payment or from any other cause.

IN WITNESS WHEREOF, the President and secretary of said corporation, under authority of a resolution duly adopted by its Board of Trustees have hereunto signed the name of the corporation and affixed its corporate seal.

SCANDINAVIAN-AMERICAN BUILDING COMPANY,

(Seal)

By CHARLES DRURY, Pres.

By J. V. SHELDON, Sec'y.

The following revenue stamps, with cancellations thereof, appear on the back of the above note:

$50.00, S A B Co. Oct. 7, 1920.

$25.00, S A B Co. Oct. 7, 1920.

$60.00, S A B Co. Oct. 7, 1920.

$ 2.00, S A B Co. Oct. 7, 1920.

$10.00, S A B Co. Oct. 7, 1920.

When Larson went east he said he was taking these papers east and would have a proper assign-

(Testimony of J. V. Sheldon.)

ment drawn up in favor of the bank, for the reason that the bank had advanced certain moneys and would have to advance some more, and this assignment was taken for the protection of the bank. The records show that they had advanced money at that time. The records show a purchase of this stock and the bank did not have the actual stock until December, 1920, it was not issued, but the books showed as early as June 25th, 1920, that the stock had been purchased. I considered that entry in advance to the Building Company myself, and I think there is some evidence of it in the way that appears. (Referring to cards.) There was some indebtedness owing by the Building Company to the bank September, 1920, possibly an [894] overdraft, but no note. As to why I did not carry this note in the records of the bank, the agreement to deliver the bonds had not been—in fact the bond issue had not been prepared, and nothing had been done about it, and Mr. Drury and I executed that note in favor of the bank. I did not carry it like any other records of the bank because I was not authorized to make any such entry on the books. Mr. Larson, I think, was away at the time. I took it up with other members with the idea of entering it on the records of the Bank. I do not know what they said. I referred particularly to getting it into the records of the bank, but I talked with Mr. Dean Johnson about it and stated I had such a note. The idea was that I looked upon it merely as a tentative thing to be substituted by the bonds in time,

(Testimony of J. V. Sheldon.)

but at that time, as I say, they had not gotten the bonds issued, and I did not know whether they would or not. I think I was present at the meeting of the board of December 10th when the question of collateralizing this $600,000 mortgage was taken up and officially passed upon. There is not any notation of it here in the minutes of the bank, but I can tell you it was discussed at that meeting. No resolution was passed of any kind authorizing the adoption of that as collateral. There is nothing on the books in reference to that matter, it was discussed at the meeting of December 10th, however. There is no building company official record showing that this mortgage was allowed to be collateralized in that manner by the building company. There was no meeting where the majority of the trustees authorized the collateralizing of this note by the building company to my knowledge. [895]

Cross-Examination.

(By Mr. LANGHORNE.)

It was the original intention that the money under the Simpson mortgage was not to be obtained until the building was completed, but in September, 1920, that was not the intention, we had been promised repeatedly by Mr. Simpson before that time, that he would get us advances against that mortgage. I believe that the commitment says that we were not to get any money until the building was completed, but we were assured by Mr. Simpson that the mortgage would

(Testimony of J. V. Sheldon.)

be used. The commitment says; that, but that is not what Mr. Simpson and Mr. Webber assured us. I do not know how we were going to build this building without this $600,000. I asked Mr. Larson that many times. It could not be built for $600,000. We were going to get an advance of $600,000, and when that was completed that was to be turned to the Metropolitan Life Insurance Company. There would be no bills when this building was finished. In the meantime the second mortgage bonds would be issued, and Larson told me that part of them had been placed with contractors, and the Seattle bank was to carry part of them, and the Tacoma bank a small portion. I took Mr. Larson's assurance that the building was to be financed entirely outside of the bank, and we left it to him and took his word for it. Afterwards I knew it was not being financed from the outside. At the time these contracts were being signed up I do not think any money had been expended at that time; I do not think there had been any call for any money at that time. I knew that the contractors were going to expend the money there and to supply materials, I knew that long prior to September 20th, 1920. The idea of having this mortgage assigned to the bank was simply to secure the bank for money that they were putting up, they were paying these bills as they went along. The directors of the Scandinavian-American Building Company never authorized me and Mr. Drury to sign this note of $360,000. We

(Testimony of J. V. Sheldon.)

signed it and I kept it [896] in my desk from the time it was signed until the bank closed January 15th. I told Mr. Dean Johnson, one of the directors of the bank, I do not know whether I mentioned it to Mr. Larson or not. I testified that I knew what entry was made on June 25th, $200,000 charged to stock and bond account. I am not sure that I was present when Mr. Larson made a subscription of $199,600 worth of stock of the building company. That subscription to the capital stock of the building company was not completed until December, 1920. It was subscribed for by Larson but the stock was not issued.

I was not present at the bank at the time that the entry of $200,000 got into the stock and bond account. All I know is that the entry was made at the direction of Mr. Larson. I mean the certificates of stock were not signed until December, 1920. I do not see anything in the minute-book to indicate that it was signed in December, 1920.

Mr. Simpson gave us assurance on August 17th, at the time the power of attorney was executed that he was going to get a loan from Strauss & Co. for $1,250,000. I think that I signed all of the notes of the Building Company and knew of all of the overdrafts of that company.

Cross-examination.

(By Mr. STILES.)

Exhibit No. 184 bears my signature as secretary of the building company. (Ab. 69.)

(Testimony of J. V. Sheldon.)

"Q. Now, will you state what authority you had, you and Mr. Drury, to sign that paper?

A. I do not know that there is any authority, Judge Stiles, that is in the shape of a resolution.

Q. Isn't it a fact that the board of directors of the bank passed their resolution practically ordering you and Mr. Drury to execute this agreement? [897]

A. No, I think there is a resolution passed in the bank minutes.

Q. Didn't you do it simply because the bank directors had passed that resolution?

A. No, I could not say that.

Q. Doesn't this recite the fact that the directors of the Scandinavian-American Bank of Tacoma had passed a resolution and that the Scandinavian-American Building Company agreed to execute, etc.? Had the Scandinavian-American Building Company agreed to do anything of the kind by a meeting of its board of directors?

A. I do not believe that is in its minutes.

Q. Was there any such meeting?

A. That is what I say, I do not think there was.

Cross-examination.

(By Mr. FLICK.)

There was no board meeting of the building company except as shown in the book. The matter of the bank's using this $600,000 mortgage as collateral was undoubtedly discussed. That is, Mr. Drury and I, who were also officers of the bank, talked it over several times with Dean Johnson.

(Testimony of J. V. Sheldon.)

There was no board meeting of the building company called and no board meeting of the bank called for the purpose of authorizing the collateralization of this mortgage. (Statement of Facts, pp. 905–906).

Cross-examination.

(By Mr. LUND.)

I believe the Simpson note and mortgage and trust agreement were in a special file in the vault of the bank on June 28th, and am pretty sure that they were in our possession all the time until September 24. I had knowledge a few days after the event of the entry in June of the purchase by the bank of the stock and the credit of the $200,000. I and Mr. Ogden signed all the checks of the building company and I knew that we were drawing against the $200,000 which was credited on account of the stock, and that from time to [898] time the building company had overdrafts, and as an officer of the bank and of the building company knew that they were covered by note. Mr. Larson attended to this and when he was not there the overdrafts probably stood until he returned. I signed all of the notes that were made at his direction. I cannot say whether I signed any note when Mr. Larson was not present. I knew from time to time the amount of overdrafts that was carried in the name of the Scandinavian-American Building Company, that information being placed on my desk the morning after the overdraft occurred.

Testimony of George G. Williamson, for Tacoma Millwork Supply Company (Recalled).

GEORGE G. WILLIAMSON, a witness, being recalled, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

In reference to the testimony of Mr. Larson that he consulted me in reference to the issuing of the stock of the Scandinavian-American Building Company to the Scandinavian-American Bank, and that I advised him that it was all right, I will state that I did not have any conversation with Mr. Larson in reference to the issuance of any stock. I did not know until after the 8th of January, 1921, that the Scandinavian-American Bank had any stock of the building company. I fix that date because I left Berkeley, California, on the 6th of January, and I could not have arrived here until the 8th, Mr. Sheldon came into the office and wanted me to take an endorsement on a certificate of stock of the building company that had been issued in my name, and I signed it, he stated to me that the bank examiner had examined the bank in December and found that the bank was carrying $200,000 in stocks and bonds represented by the building company's stocks. The stock was not there and they issued the stock and got all of it but the one share I had. I endorsed it. That was the first time [899] I knew the Scandinavian-American Bank had anything to do with any building company stock di-

(Testimony of George W. Williamson.)

rectly or indirectly. The matter had never been mentioned to me by Mr. Larson or anybody else up to that time. It was absolutely represented at the inception that Mr. Larson was subscribing for all of that stock except one share each for the other directors. Mr. Larson was to get the money for the purchase of that stock he was subscribing for in his own name, but I do not suppose anybody, at least I did not think that Mr. Larson was going to furnish $200,000, but he said that he had arranged that.

In reference to the claim that Mr. Larson in company with Mr. Drury and Dean Johnson had conferences with me in my office when it was agreed that the bank should finance the building company by advancing money, and it should be secured for the advances by the balance of the $750,000 second mortgage bonds left on hand, I will say that, no such meeting of that kind was ever held at a time I was present. If there had been, they certainly would not have had any consent from me to that proposition. Mr. Larson at no time took up with me the question of advancing moneys from the Bank for the purpose of financing the building company's operations. I took it up with him once, and found out that a $25,000 loan had been made by the bank to the building company, and I told him right then and there I was going to resign, and I did resign. That is the only time I ever discussed it with Mr. Larson, except some time afterwards, he asked me

(Testimony of George W. Williamson.)
if I would not withdraw my resignation and I told him absolutely no.

Cross-examination.

(By Mr. FLICK.)

I know Mr. Freeman's handwriting. Referring to Exhibit 195 the handwriting here, Scandinavian-American Building Company capital stock $200,-000, incorporated under the laws of the State of Washington, the name of Charles Drury, and "one" and "they are," and [900] "Scandinavian-American Building Company" look like Mr. Freeman's handwriting. This certificate shows that Mr. Freeman filled in the words "Larson." Referring to Exhibit 250 I think the name of Scandinavian-American Building Company Capital stock $200,-000, incorporated under the laws of the State of Washington, and other handwriting in there is the handwriting of Mr. Freeman, showing 1,996 shares.

Exhibit No. 250.

(Flick.)

Scandinavian-American Building Company.

No. 6. Shares 1996.

Capital $200,000.00.

Incorporated Under the Laws of Washington.

THIS CERTIFIES THAT Scandinavian-American Bank of Tacoma is the owner of Nineteen Hundred Ninety-six shares of the capital stock of Scandinavian-American Building Company transferable only on the Books of the Corporation in

(Testimony of George W. Williamson.)

person or by Attorney on surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF, the duly authorized officers of this Corporation have hereunto subscribed their names and caused the corporate seal to be hereto affixed this 25th day of June, A. D. 1920.

[Corporation Seal]

(Signed) J. V. SHELDON,
Sec'y.

(Signed) CHARLES DRURY,
Pres. [901]

Cross-examination.

(By Mr. LUND.)

I was present on February 10th or January 10th, 1920, at a meeting of the board of trustees of the bank, at which the proposition of transferring the title to this property to the Building Company was taken up. I knew very well the representations made with respect to that. I think the resolutions were prepared by our office. I do not think the other part of it was (referring to pages 417 to 421, exhibit 191 or exhibit 183).

Testimony of Frank M. Lamborn, for the Receiver.

FRANK M. LAMBORN, a witness called by the Receiver, being duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am State Printer and live at Olympia; have been a stockholder in the Scandinavian-American

(Testimony of Frank M. Lamborn.)

Bank about 20 months from the time I purchased stock until the bank closed. I was director during 1920 up until the time of the closing of the bank. I first found that funds of the Scandinavian-American Bank were being used in this building late in the fall of 1920. I asked Mr. Larson upon one or two occasions about the finances, how it was getting along, and he said it was all attended to and had been financed, no need of worry, the finances were taken care of. I did not ask him specifically as to the use of the funds of the bank in this building, that was not discussed at all. It was not necessary, because he said he had financed it and the money was ready in New York. The loaning of the bank's money for the construction of the building was not brought to my attention until late in the fall, I think it was at the November meeting, but it was not up for any formal or official discussion. It was discussed in an informal way. There was not a full meeting of the board. Something [902] mentioned about the advances being made to the building company, and it was brought out that the loan was only temporary, until the money of the mortgage was forthcoming. Someone called it a credit memo. That is the way it was brought out and I also think Mr. Drury mentioned at the time that any advances made at the time were absolutely safe and covered by mortgage or bonds, I cannot recall which. I cannot say that I know of the bank purchasing $200,000 worth of the capital stock of the Scandinavian-American Building Company; I

(Testimony of Frank M. Lamborn.)

am not sure I ever knew of it. My consent was never asked for the purchase of this stock.

Cross-examination.

(By Mr. FLICK.)

Mr. Larson was manager and president of the bank. I did not have anything to do with the building company at all. It was left in Mr. Larson's hands to make any advances, he would naturally handle those things.

Cross-examination.

(By Mr. METZGER.)

I did not have any knowledge of any advances made by the bank to the building company until late in the fall of 1920. I could not say how many meetings of the board of trustees I attended during 1920. I could not say that I was present at the meeting of the directors on Friday, April 9th, as recited in the minutes on page 431 of Exhibit 183. I do not recall the facts recited in those minutes as "it was moved by Mr. Johnson, seconded by Mr. Lindberg, and carried that a loan of $25,000 to the Scandinavian-American Building Company be authorized." I would not say that that action was not taken. I would not doubt it because it is a matter of record. I recall being present at a meeting of the board of directors of the bank held Friday, July 23d, when the resignation of Mr. Williamson was received. It was not acted upon. Mr. Larson said he would see Williamson about it. At the meetings I attended the loans that had been

(Testimony of Frank M. Lamborn.)

made were submitted [903] to the directors for approval. I would not dispute the record as it appears on page 437 of Exhibit 183, reciting that I was present at that time, but it does not serve to refresh my recollection as to having seen the record of any loans made by the bank to the building company until late in the fall. The loans, new loans and renewals, consisting of several sheets of typewritten papers, were passed around to every director and gone over hurriedly and turned back to the secretary of the meeting again. I recall being present at a meeting of the board of directors of the bank held Friday, July 23d, when the resignation of Mr. George Johnson was presented.

I knew that the building company had entered into a contract with the McClintic-Marshall Company to furnish steel to the building, but not as a director of the bank. It came to me while I was a director but not as a director. I knew of it after the building was in the course of construction, it was last year, 1920, I think it was before June. I could not say whether it was before they started getting material here. [904]

Testimony of Claude P. Hay, for the Receiver.

CLAUDE P. HAY, deputy supervisor of banking, being called by the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am deputy supervisor of banking department

(Testimony of Claude P. Hay.)

of the State of Washington and have been connected with the banking department off and on since 1908. After March, 1920, I was Bank Commissioner, and prior to that I had been examiner. Since 1908 when I originally started in. I was State Bank commissioner from March 1st, 1920, to April first of this year, when the banking laws of this state were changed and I became deputy supervisor of banks, Mr. J. P. Duke being appointed supervisor.

I could not say the dates, but I participated in two examinations of the Scandinavian-American Bank of Tacoma while Mr. Larson was vice-president of the bank and while I was bank examiner. I think I made an examination about the first of January, 1920. In reference to conversation with Mr. Larson in regard to the bank building, I do not remember now to what extent he had gone ahead with the organization of this building company, or putting up the building, but I know he showed me some plans and we discussed the matter. I had some discussion with him in reference to using the bank money for the purpose. The matter of financing the organization of this building had been discussed with my predecessor L. H. Moore, I would not want to say whether it was by Larson or not. Mr. Larson told me that Mr. Moore would not have any occasion any more, to worry any more about the building, as he had it financed in New York, and not one nickel of the bank's money would be put into it or something to that effect; I think as a matter of fact those were about the words. I wrote

(Testimony of Claude P. Hay.)
Exhibit 219 dated June 21st, 1920. I cannot recall just this moment [905] what brought the letter about at that time unless I had heard some comments made that the bank was to pay to this building, and used its own funds, or something of that sort, and just as a matter of record I wrote the letter at that time. I had not made an examination of the bank at that time. There were calls made periodically when the bank would make a condensed statement to the department. I had regular reports of that nature from the examiners working under me. That letter refers to a meeting that we had in their building, that is at their old location. I do not know the date. I had called for the purpose of discussing with Mr. Larson certain conditions in connection with the bank; and found Mr. Larson was away, and it so happened that the board was to meet at their regular meeting day and I was asked to meet with them which I did. As I recall, there was no quorum present and the meeting was informal, but at that meeting I made it very plain to them that none of the bank's funds were to be used in the construction of the building. Mr. Drury, Mr. Sheldon and Mr. Williamson were there. Mr. Larson was not there. Mr. Dean Johnson was there and Mr. Ogden the cashier. It was probably a few days preceding the date of that letter. I do not remember writing Exhibit 220, being a letter under date of August 23, 1920. I do not know there was such a letter written. I should say it was my letter though I had forgotten it.

(Testimony of Claude P. Hay.)

In reference to Exhibit 221, letter of November 12, 1920, Mr. Larson and Mr. Drury came to Olympia for the purpose of obtaining permission to carry that building at an amount in excess of the amount prescribed by law, that is 20% of the capital, surplus and undivided profits. I had a discussion with them on that subject. On January 8th, Saturday afternoon, week before the bank closed, I had a meeting with Larson, Drury, Sheldon, and I think Lamborn. I called the meeting for the purpose of requiring the board to remove certain [906] objectionable assets from the bank, and to generally discuss the results of the examination that had been made by our examiner. I had some discussion with them at that time in reference to the bank using any of the funds for the construction of this building. The examination had disclosed, in spite of my instructions, the bank had, one way or another, invested in that building, and it was my purpose in having this conference to determine whether or not the bank would sustain any loss in connection with the building, as well as other items which might come up, which might have appeared in the report. I investigated the status of the building company and the building company's stock from the real estate and various loans and attempted to determine just what their worth was, and how they were secured. The members of the board admitted that they had made these advances contrary to my instructions. My examination showed that this loan had been made to the building

(Testimony of Claude P. Hay.)

company by the bank. Mr. Larson was at the January 8th meeting, I am sure, and that was the meeting that he tendered his resignation to me and I refused to accept it. He was present and was taking part in the conversation where I was told about this security.

(Question read as follows:) You may state whether or not at that meeting you called the attention of the directors of this bank and Mr. Larson, the president of the bank, to the money that had been advanced by the bank to the building company, contrary to your orders, and Mr. Larson or Mr. Drury, chairman of the finance committee, did either of those two gentlemen tell you, in the presence of those you stated were there, of any security the bank had taken to protect itself from those advances so made?

WITNESS.—To the first part of the question my answer would be that I did call their attention to the amount of money which loaned [907] directly and indirectly to the building company. To the second part of it they did make the statement, to my knowledge, they represented that the money so advanced was properly secured by a mortgage of $600,000. I do not remember just what conversation there was in regard to it. I do not think I was at the bank between January 8th and the day the bank finally closed, January 15th, but I was at the offices over the bank. During that time I had meetings with members of the Clearing-house here in Tacoma, and also in Seattle, trying to save the

(Testimony of Claude P. Hay.)

bank. On January 15th, 1921, I ordered the bank closed and appointed Mr. Forbes P. Haskell, Jr., as special commissioner here for the liquidation of this bank.

Cross-examination.

(By Mr. LANGHORNE.)

I do not recall when I first learned about the mortgage of $600,000, but I presume that was disclosed to me by the examination that was made in December. I do not think I ever had any information regarding it prior to that time, and if no such report was made I got the information from the statements that were made to me at the January 8th meeting. I knew what the approximate cost of the building would be—somewhere around a million dollars, and knew that they had only a mortgage for $600,000, wherewith to finance a building. It did occur to me that it would take some $400,000 more to finance the building, but there was a second mortgage to secure the bond issue, which was to be floated, which was to take care of the balance of it. I never saw that mortgage or any document or instrument of any kind. That was simply information that was given to me by Mr. Duryr, and Mr. Larson was with him. After looking at Exhibit 209, letter [908] under date of June 21, 1920, I do not think I had any knowledge at that time of their doing anything, investing any money in connection with the finances of that building. I think I simply warned them, warned them against doing it. They had $260,000 or $280,000 invested in the

(Testimony of Claude P. Hay.)
old building, in the site. I did have an impression or suspicion that they were using the bank's funds as advances to the building, but Mr. Drury told me positively, no, I think he said not a sou marquee of the bank's money was used in that building. Somebody exhibited some letters from some eastern concern, I do not recall whether it was Strauss and Company, concerning the financing of the building, but somebody who was apparently arranging to handle a mortgage on the property. I do not remember when that was. I did find the item of $200,000 on the books of the bank which was marked or called "the Scandinavian-American Building Company." That was at a later date. It was treated of in one of the reports called for by our office. That was the letter I did not remember of having written, dated August 23d. I do not recall now anything about that letter. I do know I did not get any reply to it, and I presume in the course of the next few weeks I held one of the meetings I had in mind. Between August 23, 1920, and January 8th, 1921, I made no special examination of the books of the bank to determine whether or not the building company had got any money on that mortgage, and had retired the items to which I objected. The regular examination of the bank was made in December, but I did discuss this $200,000 in stock with Mr. Drury, and I presume now it must have been after the date of this letter, and at that time he told me that it had been financed in the east. I think that was the time he made the

(Testimony of Claude P. Hay.)

[909] statement that not one sou marquee of the bank's money was in the building. That must have been between August 23 and December. When the December, 1920, report came in I got the information that the item of $200,000 which the bank was carrying there in the name of the Scandinavian-American Building Company had not been retired. I made no special investigation of that, that was simply included in other matters that were taken up on the conference on January 8th. At that time my understanding was that after Mr. Simpson had failed to negotiate a loan in the east, the building was constructed and the bank advanced the money to the building, taking an assignment of that mortgage back to secure all of its advances. Without looking at the record I cannot recall what the advances were. At the meeting with the bank officers in January, 1921, I was informed by the trustees that the money advanced to the building company by the bank was properly secured by a mortgage for $600,000 and prior to that time I had heard in some way something indefinite about a mortgage for $600,000, but this was the first time I had heard any of the trustees or officers of the bank or building company say anything directly to the effect that this mortgage was security to the bank, and at that meeting nothing was said as to when the assignment of the mortgage had been made to the bank or how long they had held it. I never asked to see the document, I would not have done that part of the work

(Testimony of Claude P. Hay.)
and I was simply determining the policy that should be followed based on that report. [910]

Cross-examination.

(By Mr. STILES.)

I am not sure about the date of the examination that was made before December, 1920. I think I made that examination or participated in it. I think it was in January, 1920. There were two examinations during the year, one in January, and one in December. In January, 1920, I think the title to the real estate was in the bank, and in December, 1920, I think the lots had been deeded to the Scandinavian-American Building Company. My examiners did not discover anything that had taken place of the value of the lots. The real estate that they had previously owned had resolved itself into an equity, which was owned by the building company. I am inclined to think that the bank's records of December, 1920, showed that the bank property was an asset of the bank, but as a matter of fact, the property had been deeded in the previous March. Neither I nor the examiner attempted to reconcile this situation, there was not anything to reconcile. There was something irregular there, but that was one of the things that caused me to have this meeting on January 8th. That was for the purpose of reconciling it, perhaps.

Cross-examination.

(By Mr. METZGER.)

That was a meeting with Mr. Drury and Mr.

(Testimony of Claude P. Hay.)

Larson at my office in Olympia, immediately preceding the date of the letter of November 12, 1920, but that was the only meeting. If the records show there were two meetings, that is an error, because there was only one meeting.

Cross-examination.

(By Mr. HOLT.)

Q. Let me see if I understand your testimony correctly: You testified that this meeting in January, a statement [910½] was made to you by some of the directors at that meeting, that the bank then held an assignment of the $600,000 mortgage, which was payable to Mr. Simpson, as security for the indebtedness for the money that had been advanced.

A. Yes, Mr. Drury, one of the directors of the bank, made that statement, I am quite positive because he did most of the talking.

Q. And after that meeting Mr. Drury said to you, we hold an assignment of the $600,000 mortgage, and that is security for the loan? A. Yes.

Q. And you also testified that; until that time you had never heard any of the trustees of the bank refer to that $600,000 mortgage as security? Did you not say, I had heard something in some way, picked up something about that, but I had never heard any of them say anything directly to that effect.

A. I do not recall at this time I ever heard any of the directors positively make that statement prior to that time. [911]

Testimony of Samuel L. Morse, for the Receiver.

SAMUEL L. MORSE, a witness called by the receiver, being duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am in the banking business and was formerly employed by the Scandinavian-American Bank at Tacoma, in the capacity of teller. Defendant's Exhibits 185 and 188 are not in my handwriting. Exhibit 187 is in my handwriting. The description of the note and the description of the collateral, down to the two abstracts which is in Mr. Geiger's handwriting. In Exhibit 188 the words "real estate loans" means that was turned into a real estate loan. We carried separate division of our bills receivable. There were commercial loans and real estate loans, and this item was charged up with the real estate loans in the sum of $200,000 and these numbers on the cards refer to the numbers that the notes bore. On the back of that sheet are nine lines in writing; that is the collateral to the notes and as it came to the cage, the back of the note card is used for the description of the collateral. The writing on the back is in my handwriting. I put that there on Mr. Larson's instructions. Mr. Larson brought back a large envelope, some documentary envelope and told me what was in it, said it was a note of the Scandinavian-American Building Company for $600,000 and a mortgage from the Building Company for $600,000 and a mortgage from the Build-

(Testimony of Samuel L. Morse.)

ing Company to G. Wallace Simpson, and assignment from G. Wallace Simpson to the bank, and to put through a memorandum against the real estate loans of $200,000 and use this as collateral to that loan; and he opened the envelope and read the note over. The note was written on a long form and quite a little detail and [912] I read the mortgage and assignment, and it was not quite clear to me. So just about that time Mr. Bean, vice-president, came in and I said to Mr. Bean, "Mr. Larson says to put through a memorandum note against real estate here, $200,000, and I don't quite see the connection." Mr. Larson speaks, as he is walking away at times, and I was not sure I got it. I asked Mr. Bean if he knew anything about it, and he said no, he did not know whether it was right or not, and we went up to Mr. Larson's desk and Mr. Bean says, "Mr. Morse does not understand this"; he says, "you say put in a memorandum note against real estate loans, $200,000, and he says is that the way you want it handled?" Mr. Larson says, "Yes; just make a memorandum note, $200,000, against real estate loans," and so Bean brought it back and I made out the memorandum note at the same time. That was on the 9th. It went to the credit of the Scandinavian-American Building Company at that same time. The paper I am referring to I think is a memorandum note; you will find it on a brown piece of paper. This handwriting on the back of this exhibit on which I put this collateral to the credit of this note, to secure this note, was done

(Testimony of Samuel L. Morse.)

under the express direction of Mr. Larson, the president of the bank. I spoke about it at the time; this mortgage and note is for $600,000 and he said that was all right, just put this $200,000 against it.

Cross-examination.

(By Mr. LANGHORNE.)

This $200,000 I would consider a new note. There were two other charges against it at the time, one hundred and fifty, I think; December 9th, there was a $100,000 note and a $50,000 note charged against the Scandinavian-American Building Company at the same time this $200,000 was credited. [913] The $200,000 was credited to the Scandinavian-American Building Company and then the two notes we had in there, one for fifty and one for one hundred, had been charged up against the account and thereby retired. This was a new note and at the same time increased their obligation to the bank $50,000. There was a $200,000 credit and $150,000 of their notes that we had in there was charged off, so that it increased their loan on the note card by $50,000, that is, increased their liability to the bank by $50,000. I do not know how much of that $50,000 was already represented in overdrafts on the books of the bank on that day. I am under the impression that the overdraft at that time was $43,000. So that the actual new additional credit was in the neighborhood of $7,000. It is true that prior to December, 1920, I carried on the stocks and bonds ledger $200,000 item of the capital stock of the Building Company. The memorandum note was

(Testimony of Samuel L. Morse.)
made up in its entirety by me; I signed it, Scandinavian-American Building Company, and then wrote "memorandum note" under it. It was never signed by any officer of the building company. This transaction was put through on the 9th of December. An examination of the bank was made by the bank commissioners' office on December 20th.

Q. And at the time you made it, you had reason to believe that an examination by the banking authorities was imminent, did you not?

A. No, I would not think that, because in the past the [914] examination was made about the close of the year; in fact, I think from 1919 to 1921 it represented over a year. When they came in there on the 20th of December, I was a little bit surprised, because I did not expect them until the first of the year. There were two examinations in 1920.

The defendants and cross-complainants, J. P. Duke, as Supervisor of Banking of the State of Washington, and Forbes P. Haskell, as Special Deputy Supervisor of Banking of the State of Washington, in charge of the liquidation of the Scandinavian-American Bank hereupon offered exemplified copies of the following papers, which were admitted as Exhibits (certified copies of these instruments have heretofore been offered in evidence by The Far West Clay Company, being numbered Exhibits Nos. 237, 238, 239, 240, 244, 245).

Receiver's Exhibit No. 322.

"324811.

This Indenture Witnesseth, That Scandinavian-American Bank, of Tacoma, a corporation organized and existing under the laws of the State of Washington, party of the first part, for and in consideration of the sum of One (1) Dollars in lawful money of the United States of America, to it in hand paid by J. E. Chilberg and Anna M. Chilberg (husband and wife), parties of the second part, has Granted, Bargained and Sold, and by these presents does Grant, Bargain, Sell and Convey unto the said parties of the second part, and to their heirs and assigns, the following described real property, situate, lying and being in the County of Pierce, State of Washington, to wit:

Lots numbered Eleven (11) and Twelve (12), in Block Ten Hundred and Three (1003) in the City of Tacoma, as shown and designated on a certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said Pierce County, February 3d, 1875.

Also including herein the party walls on each or either side of said premises, and the agreements respecting the same, and all rights on or to said party walls or under or by virtue of all of the agreements respecting the same.

Any streets or alleys, or portions thereof, on which the above property abuts which have been or may here*in*after be [915] vacated by City Council or

otherwise and be annexed to the above described property or become the property of the grantor.

To Have and To Hold, the said premises, with all their appurtenances, unto the said parties of the second part, and to their heirs and assigns forever; and the said Scandinavian-American Bank, of Tacoma, party of the first part, for itself and its successors, does hereby covenant to and with the said parties of the second part, their heirs and assigns, that it is the owner in fee simple of said premises, and that they are free from all incumbrances except mortgages of record, and that it will Warrant and Defend the title thereto against all lawful claims whatsoever.

In Witness Whereof, the said party of the first part has caused its corporate name and seal to be hereunto subscribed and affixed; and these presents to be executed by its officers thereunto duly authorized, this 1st day of September, 1910.

SCANDINAVIAN-AMERICAN BANK
OF TACOMA.

By W. H. PRINGLE,
Vice-prest.,
Its President.

Attest: E. C. JOHNSON,
Cashier.

[Corporation Seal of Scandinavian-American Bank of Tacoma.]

Executed in presence of

V. A. SWANSON."

Acknowledged by W. H. Pringle, Vice-president, and E. C. Johnson, Cashier, on the 7th day of

September, 1910, before V. A. Swanson, Notary Public residing at Tacoma, Pierce County, Washington.

Receiver's Exhibit No. 323.

"331893.

This Indenture Witnesseth, That J. E. Chilberg and Anna M. Chilberg (husband and wife) parties of the first part, for and in consideration of the sum of One (1) Dollars in lawful money of the United States of America to them in hand paid by Scandinavian-American Bank, of Tacoma, a corporation party of the second part, have Granted, Bargained and Sold, and by these presents do Grant, Bargain, Sell, and Convey unto the said party of the second part, and to its successors *heirs* and assigns, the following described real property, situate, lying and being in the County of Pierce State of Washington, to wit:

Lots numbered Eleven (11) and Twelve (12), in Block Ten Hundred Three (1003) in the City of Tacoma, as shown and designated on a certain plat entitled "Map of New Tacoma, Washington, Territory," which plat was filed for record in the office of the Auditor of said Pierce County, February 3rd, 1875.

Also including herein the party-walls on each or either side of said premises and the agreements respecting the same, and all rights in or to said party-walls or under or by virtue of all of the agreements respecting the same. [916]

Any streets or alleys, or portions thereof, on which

the above property abuts which have been or may hereafter be vacated by City Counsil or otherwise and be annexed to the above described property or become the property of the grantors.

To Have and To Hold, the said premises, with all their appurtenances, unto the said party of the second part, and to its *heirs* and assigns forever; and the said J. E. Chilberg and Anna M. Chilberg (Husband and wife) parties of the first part, for them and for their heirs, executors and administrators, do hereby covenant to and with the said party of the second part its successors *heirs* and assigns, that they are the owners in fee simple of said premises, and that they are free from all encumbrances except mortgages for $150,000.00, and that They will Warrant and Defend the title thereto against all lawful claims whatsoever.

Witness our hands and seals this 12th day of January A. D. One Thousand Nine Hundred and Eleven.

J. E. CHILBERG. (Seal)
ANNA M. CHILBERG. (Seal)

Signed, sealed and delivered in presence of

____________________."

Acknowledged by J. E. Chilberg and Anna M. Chilberg, husband and wife, on the 12th day of January, 1911, before V. A. Swanson, Notary Public residing at Tacoma, Pierce, County, Washington.

Receiver's Exhibit No. 324.

"332017.

State of Washington,
County of King,—ss.

AFFIDAVIT OF GOOD FAITH.

J. E. Chilberg and Anna M. Chilberg, his wife, being first duly sworn, on oath depose and say, and each says, that they heretofore duly made, executed and delivered to The Penn Mutual Life Insurance Company, a corporation, of Philadelphia, Pennsylvania, their certain mortgage on the following described property situated in Pierce County, Washington, to wit:

Lots numbered eleven (11) and twelve (12) in Block numbered ten hundred and three (1003) in the City of Tacōma, as shown and designated on a certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said Pierce County, February 3rd, 1875. Also including herein the party walls on each or either side of said premises, and the agreements respecting the same, and all rights in or to said party-walls or under or by virtue of all of the agreements respecting the same.

And streets, or alleys, or portions thereof, on which the above property abuts which have been or may be vacated by City Council or otherwise and be annexed to the above described property, or become the property of the mortgagors, their heirs, executors, successors and assigns, shall immediately

become additional security under this mortgage and subject to all the terms and conditions in said mortgage; [917] together with all the buildings and structures thereon or that may hereafter be placed thereon, and also any and all elevators, engines, boilers, and all heating, lighting, plumbing and ventilating fixtures and apparatus now on said premises, or that may hereafter be placed thereon, with all and singular the tenements, hereditaments, and appurtenances to the same belonging or in anywise appertaining, hereby expressly waiving and relinquishing any and all right or claim of homestead, and the benefit of any and all exemption appraisement or stay laws of the State of Washington; to secure the payment of the principal sum of One Hundred Thousand ($100,000.00) Dollars, and interest thereon, as evidenced by a certain promissory note executed by them in favor of said Pen Mutual Life Insurance Company; said mortgage being dated September 2, 1910, and acknowledged September 20, 1910 and recorded in the office of the Auditor of Pierce County, Washington, on September 23, 1910, in Book 165 of Mortgages at Page 452, which said mortgage is hereby referred to and made a part hereof as fully and to the same extent as if set forth in full herein;

Affiants and each of them further state, on oath that said mortgage is and was made in good faith, and without any design to hinder, delay, or defraud creditors.

J. E. CHILBERG.
ANNA M. CHILBERG.

Subscribed and sworn to before me this 14th day of January, A. D. 1911.

[Notarial Seal] W. V. RINEHART, Jr.,
Notary Public in and for the State of Washington,
Residing at Seattle in said County.

Receiver's Exhibit No. 325.

"553362.

(Internal Revenue $350.00 2/25/20 M. M. C. E. M. McC. Scandinavian-American Bank of Tacoma, Wn.)

WARRANTY DEED.

The Grantor, Scandinavian-American Bank of Tacoma, a corporation organized under the laws of Washington, of Tacoma, County of Pierce, State of Washington, for and in consideration of Ten Dollars and other valuable considerations in hand paid hereby conveys and warrants to SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation organized under the laws of Washington, the following described real estate situate in the County of Pierce State of Washington, to-wit:

Lots Eleven (11) and Twelve (12) in Block One thousand and three (1003) as shown and designated upon a certain plat for record in the office of the Auditor of Pierce County, Washington entitled "Map of *of* New Tacoma, W. T."

Dated this 25th day of February, 1920.

SCANDINAVIAN-AMERICAN BANK
OF TACOMA.

By O. S. LARSON,
President.

By M. M. OGDEN,
Cashier.''

[Corporate Seal of Scandinavian-American Bank of Tacoma, Wn.]

Acknowledged by O. S. Larson, President, and M. M. Ogden, Cashier, before E. F. Freeman, Notary Public, residing at Tacoma, Wash., on February 25, 1920. [918]

Rece*i*ver's Exhibit No. 326.

''324812.

MORTGAGE.

This Indenture, Made this 2nd day of September A. D. 1910, between J. E. Chilberg and Anna M. Chilberg, husband and wife at all times since previous to acquiring title to the within described property, jointly and severally, hereinafter referred to as the ''first party'' and The Penn Mutual*l* Life Insurance Company, a corporation, organized under the laws of the State of Pennsylvania, and having its principal place of business at Philadelphia, hereinafter referred to as the ''second party'':

Witnesseth, that the first party in consideration of One Hundred Thousand ($100,000.00) Dollars, to first party in hand paid by second party, the receipt of which is hereby acknowledged does by these

presents grant, sell, convey and warrant unto second party, its successors and assigns, the following described property, situated in Pierce County, Washington, to-wit:

Lots numbered eleven (11) and twelve (12) in Block numbered ten hundred and three (1003) in the City of Tacoma, as shown and designated on a certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said Pierce County February 3rd, 1875.

Also including herein the party-walls on each or either side of said premises, and the agreements respecting the same, and all rights in or to said party-walls or under or by virtue of all of the agreements respecting the same.

Any streets or alleys, or portions thereof, on which the above property abuts which have been or may be vacated by City Council or otherwise and be annexed to the above described property, or become the property of the mortgagees, their heirs, executors, successors and assigns, shall immediately become additional security under this mortgage and subject to all the terms and *and* conditions in said mortgage, together with all the buildings and structures thereon or that may hereafter be placed thereon, and also any and all elevators, engines, boilers, and all heating, lighting, plumbing and ventilating fixtures and apparatus now on said premises, or that may hereafter be placed thereon, with all and singular the tenements, hereditaments, and appurtenances to the same be-

longing or in any wise appertaining, hereby expressly waiving and relinquishing any and all right or claim of homestead, and the benefit of any and all exemption, appraisement or stay laws of the State of Washington,

To Have and To Hold the above granted premises unto second party, its successors and assigns, forever with all the tenements hereditaments and appurtenances thereto belonging.

First party hereby covenants and agrees to and with second party as follows, to-wit:

1. That first party is seized of said premises in fee simple absolute, and has good right to convey and mortgage the same.

2. That second party shall quietly enjoy said premises.

3. That said premises are free from all encumbrances.

4. That first party will execute or procure and deliver to second party upon demand any and all further conveyances or other instruments necessary or proper to render this mortgage a first lien upon a good and marketable title to said property. [919]

5. That first party will warrant and defend the title to said property forever against all lawful claims and demands whatsoever.

This instrument is a Mortgage given to secure the payment of the following —— sums and the performance of the following agreements, to-wit:

1. The first party is justly indebted to second party in the principal sum of $100,000.00 evidenced by a certain negotiable promissory note of even

date herewith, made by first party and payable to the order of second party, payable on the 1st day of September A. D. 1915, with interest thereon from date until maturity at the rate of 5 per cent per annum, and from maturity until paid at the rate of twelve per cent per annum, payable semi-annually on the 1st days of March and September in each year, both principal and interest payable only in United States gold coin of the present standard of weight and fineness, at the office of Penn Mutual Life Insurance Company, Philadelphia, Penna with New York exchange.

All as shown in said note and in the interest coupons thereto attached, which said principal and interest first party hereby promise and agrees to pay, and first party hereby consents to the entry of a deficiency judgment against first party jointly and severally for whatever balance of the judgment debt, costs, expenses, or attorney fees that may remain unsatisfied after the foreclosure sale, if any be made, hereunder.

First Party hereby agrees to at once procure and maintain at least $80,000.00 fire insurance on the buildings now or hereafter erected upon said property, in some responsible insurance company to be approved by second party, with loss, if any, in said insurance and in all insurance now or hereafter carried by first party on said property, payable to second party, its successors or assigns as its interest may appear, and first party agrees to pay all premiums therefor when due, and to forthwith deliver to second party all policies for all insur-

ance now or hereafter carried on said property to be held by second party until date of expiration, whether before or after foreclosure, with the right, but under no obligation, to collect by suit or otherwise, and at first party's expense any and all money that may at any time become payable thereon, and to apply the same when received to the payment of any part of the indebtedness secured by this mortgage, together with all the costs and expenses incurred in collecting same, including attorney fees, or second party *party* may elect to have the buildings repaired or new buildings erected on said mortgaged premises.

If first party shall for any reason fail to procure such insurance, or any part thereof, then second party shall have the right, but shall be under no obligation, to procure the same, or any part thereof, and to pay the premiums therefor, and first party agrees to repay same to second party on demand.

First party agrees to keep all the property above described or referred to in as good repair and condition as same is now in, or may be put in during the continuance of this mortgage, and not to commit or permit waste of said premises until the debt hereby secured is fully paid.

First party hereby agrees to pay all taxes, assessments, and other public charges that have been or may hereafter [920] be levied or assessed upon said premises, or upon said mortgage or the note hereby secured, or against the holder hereof on account thereof, and all personal taxes of first party, before same become delinquent, and to de-

liver to second party satisfactory receipts showing payment thereof, and also agrees to pay or discharge before delinquent any and all liens, or claims of any nature now existing or that may hereafter be created or perfected on or against said property mortgaged hereby, so that this mortgage shall be and continue a first lien on all said property above described until all sums hereby secured are fully paid.

If first party shall fail to perform any of the foregoing agreements, then second party shall have the right, but shall be under no obligation, to pay, contest, or extinguish such taxes, assessments, insurance premiums, liens, claims, adverse titles, or encumbrances, or cause said repairs to be made, and the amount so paid including all necessary expenses and attorney fees, with interest thereon at the rate of twelve per cent per annum, from the date of any advancement until the same is wholly repaid, shall be a lien upon the premises aforesaid and be secured by this mortgage and collected in the same manner and as a part of the debt secured hereby, and said first party expressly agrees to pay the same on demand.

The first party shall not, and will not apply for or claim any deduction by reason of this mortgage from the taxable value of said land, premises or property, but will pay all taxes upon the same in full, and also all taxes which may be levied upon this mortgage or the moneys secured hereby without regard to any law heretofore enacted or hereafter to be enacted assessing the whole or any part

thereof to the party of the second part. Upon violation of this condition or the passage by the state of a law imposing upon the mortgagee payment of the whole or any portion of the taxes on the mortgaged premises or upon the moneys or loan secured by this mortgage, or upon the rendering by any Court of competent jurisdiction of a decision that the assumption by the mortgagor of liability to pay any tax or taxes assessed against the mortgagee is legally inoperative, then and in any such event the debt hereby secured may, at the option of the party of the second part immediately become due and collectible, as though the debt had matured through lapse of time, and without any deduction, anything herein contained or any law which has passed to the contrary notwithstanding.

First party hereby agrees that in case of any failure to pay any part of the sums hereby secured, either principal or interest, taxes, liens, encumbrances, repairs, insurance premiums, or other items herein referred to, according to the terms of said note and interest notes, or of this mortgage, when the same become due or payable, or in case of any failure to comply with any of the conditions or agreements contained in this mortgage, the whole sum secured hereby shall at the option of second party, become at once due and payable, without any notice or demand, with interest from date of default until paid at the rate of twelve per cent per annum, it being agreed that time and the strict performance of the provisions hereof and of said note and interest notes are material and of the

essence of the same, and said mortgage may be foreclosed, whereupon in addition to the sum found due at the time of foreclosure, first party hereby agrees to pay [921] to second party as attorney fees in said suit the sum provided therefor in said note, and also the expense of having the abstract of title to said premises brought down to date to show the commencement of said foreclosure proceedings, together with the costs and disbursements of such suit.

It is further agreed that in case of any default in any respect so that this mortgage may be foreclosed, all the rents, revenues and profits of said premises during the existence of this mortgage and until the payment of the debts secured hereby and until the expiration of the time for redemption after foreclosure sale, or execution, are hereby mortgaged and pledged to the payment of the indebtedness secured hereby, and that upon any default on the part of said first party in the performance of any of the terms, conditions or provisions of this mortgage, said note, or said interest notes, it is agreed and shall be conclusively presumed that said rents, revenues and profits are in danger of being lost, removed and materially injured, and that said premises are insufficient to discharge the debt secured hereby; that upon the filing of the complaint to foreclose this mortgage, the court, on motion of second party, and without any notice to first party, shall appoint a receiver with the usual powers, to take immediate possession of all of the property mortgage hereby, and

to demand, receive and recover all rents, revenues and profits of said property then due or payable or that may thereafter become due or payable; that said receivership shall, at the option of the second party, continue until payment of the whole sum secured hereby, or until the expiration of the time of redemption after the foreclosure sale hereunder. The said receiver shall, on motion of second party, under the order and direction of the Court, pay any or all taxes, or other liens, insurance, and repairs on said property, out of the money so received by him, and shall pay the balance, after the expenses of said receivership have been paid, to the plaintiff in the action to apply on said mortgage indebtedness. It is agreed that said party of the second part shall be under no liability of any nature because of or arising out of the appointment of such receiver, or any of his acts and doings.

All of the provisions and agreements herein contained shall be binding on the party or parties of the first part, jointly and severally, as principals, and their respective heirs, executors, administrators, successors and assigns, as fully and to the same effect as if expressly named herein, and all rights created or evidenced hereby or by said note, or said interest notes, shall inure to the benefit of the heirs, executors, administrators, successors and assigns of said second party, as fully as if expressly named herein, and may be exercised by them.

Provided, However, That if all the foregoing covenants agreements and stipulations shall be fully performed according to the true intent hereof, this

mortgage shall thenceforth be null and void, and shall be released by second party at the cost of first party.

In witness whereof, first parties have subscribed their names hereto jointly and severally, as principals.

Executed in the presence of

J. E. CHILBERG.

ANNA M. CHILBERG.

Executed in the presence of

E. L. SHANSTROM." [922]

Acknowledged by J. E. Chilberg and Anna M. Chilberg, husband and wife, on September 20, 1910, before Percy C. Shanstrom, Notary Public residing at Seattle, King County, Washington.

Receiver's Exhibit No. 327.

"431175.

(Internal Revenue $20.00 10–27–15 J. E. C.)

AGREEMENT FOR EXTENSION OF TIME OF PAYMENT OF NOTE AND MORTGAGE.

Whereas, the undersigned, J. E. Chilberg, and Anna Chilberg, husband and wife, on or about September 2nd, 1910, for a valuable consideration, made, executed, and delivered to The Penn Mutual Life Insurance Company, a corporation of the city of Philadelphia, State of Pennsylvania, their promissory note for the sum of One Hundred Thousand Dollars ($100,000.00) payable on the first day of September, 1915, with interest from date until maturity at 5% per annum and from maturity until paid at the rate of 12% per annum; and to secure

the payment of said note, duly made, executed, and delivered to the said The Penn Mutual Life Insurance Company, their mortgage on property in Pierce County, Washington, described as follows:

Lots numbered eleven (11) and twelve (12) in Block numbered Ten hundred and three (1003) in the City of Tacoma, as shown and designated on a certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said Pierce County, February 3rd, 1875.

Also including herein the party walls on each or either side of said premises, and the agreements respecting the same, and all rights in or to said party walls or under or by virtue of all of the agreements respecting the same. Any streets or alleys, or portions thereof, on which the above property abuts which have been or may be vacated by City Council or otherwise and be annexed to the above described property, or become the property of the mortgagors, their heirs, executors, successors and assigns, shall immediately become additional security under this mortgage and subject to all the terms and conditions in said mortgage; together with all the buildings and structuress thereon or that may hereafter be placed thereon, and also any and all elevators, engines, boilers, and all heating, lighting, plumbing and ventilating fixtures and apparatus now on said premises, or that may hereafter be placed thereon, with all and singular the tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining, hereby ex-

pressly waiving and relinquishing any and all right or claim or homestead, and the benefit of any and all exemption; appraisement or stay laws of the State of Washington; and whereas said mortgage was thereafter on September 23rd, 1910, duly recorded in the office of the Auditor of said Pierce County, Washington, in book 165 of Mortgages at Page 452, being Auditor's fee number 324812; and a certified copy thereof, filed in the office of the Auditor of Pierce County, Washington, as a Chattel Mortgage, on the 18th day of January, [923] 1911, at 4/13 P. M. County Auditor's fee number 332175; and whereas no part of said principal sum of One Hundred Thousand Dollars ($100,000.00) has been paid; and

Whereas said J. E. Chilberg and Anna Chilberg husband and wife, hereby covenant and represent that they are the owners and in possession of said premises above described and have paid all interest on said note of One Hundred Thousand Dollars ($100,000.00) down to and including September 1st, 1915; and whereas, said J. E. Chilberg and Anna Chilberg, husband and wife, desire and have applied to the said The Penn Mutual Life Insurance Company for an extension of time of the payment of said sum of One Hundred Thousand Dollars ($100,000.00) so that the same may become due as follows, to wit:

$10,000.00 on September 1st, 1916,

$10,000.00 on September 1st, 1917,

$ 5,000.00 on September 1st, 1918,
$ 5,000.00 on September 1st, 1919,
$70,000.00 on September 1st, 1920,

with interest at the rate of 5½ per cent per annum from September 1st, 1915, until maturity, and at 10% per annum from maturity until paid, under the same terms and conditions in all other respects that are set out in said note and mortgage.

Now, therefore, it is hereby agreed by and between the said J. E. Chilberg and Anna Chilberg, husband and wife, and The Penn Mutual Life Insurance Company, that the time for payment of said principal sum of One Hundred Thousand ($100,000.00) shall be extended and the same shall be due and payable as follows, to wit:

$10,000.00 on September 1st, 1916,
$10,000.00 on September 1st, 1917,
$ 5,000.00 on September 1st, 1918,
$ 5,000.00 on September 1st, 1919,
$70,000.00 on September 1st, 1920,

with interest at the rate of 5½% per annum from September 1st, 1915, until maturity, and at 10% per annum from maturity until paid; said interest being payable semi-annually on the 1st days of March and September of each year, and in the same manner and under the same terms, conditions and provisions that are specified in said note and subject to all the remaining terms, conditions and provisions of said note and said mortgage, the same as if said note and mortgage had been payable originally as extended above.

Said J. E. Chilberg, and Anna Chilberg, husband and wife, hereby expressly agree that the statute of limitation shall not begin to run against said principal note for One Hundred Thousand Dollars ($100,000.00) prior to the end of said period to which the payment thereof is hereby extended, to wit: September 1st, 1920.

Said J. E. Chilberg and Anna Chilberg, husband and wife, hereby expressly agree to pay said principal sums as above specified, and to pay said interest thereon at the times hereinabove specified, and to perform and comply with each and all of the terms, conditions and provisions of said note as hereby modified and of said mortgage, with the same and like effect as if said terms and provisions were set out in full herein.

As a part of the consideration to The Penn Mutual Life Insurance Company for the granting of the foregoing extension [924] of time of payment and change in the rate of interest, the undersigned Scandinavian-American Bank of Tacoma, hereby requests that said extension of time be granted on the terms specified in this agreement and hereby consents to said extension of time and change in the rate of interest and acknowledges that said mortgage and said extension thereof are an absolute first lien on said premises, superior in every respect to any interest said Scandinavian-American Bank of Tacoma may have in said property or may hereafter acquire therein, it being understood however, that said Scandinavian-American Bank of Tacoma does not itself assume any personal obligation to

pay the indebtedness secured by said mortgage, the only personal obligation to pay said indebtedness secured by said mortgage being the personal obligation of J. E. Chilberg and Anna Chilberg, his wife.

Dated at Tacoma, Washington, this 27th day of October, A. D. 1915.

J. E. CHILBERG.
ANNA CHILBERG.
SCANDINAVIAN-AMERICAN BANK OF TACOMA.
By W. H. PRINGLE,
Its Vice-President.
Attest: E. C. JOHNSON,
Its Cashier.

[Corporate Seal of Scandinavian-American Bank of Tacoma.]

Dr.—THE PENN MUTUAL LIFE INSURANCE COMPANY.
By GEO. K. JOHNSON,
Its President.
Attest: S. A. SMITH,
Asst. Secretary."

[Corporate Seal of Penn Mutual Life Insurance Co. of Philadelphia.]

Acknowledged by W. H. Pringle, vice-president, and E. C. Johnson, Cashier of the Scandinavian-American Bank of Tacoma, on October 27, 1915, before H. Berg, Notary Public, residing at Tacoma, Pierce County, Washington.

Acknowledged Geo. K. Johnson, President, and S. A. Smith, Assistant Secretary of the Penn

Mutual Life Insurance Company, on November 10, 1915, before Frank J. Reeves, Notary Public residing at Philadelphia, Pennsylvania.

Acknowledged by J. E. Chilberg and Anna Chilberg, husband and wife, before P. C. Shanstrom, Notary Public, residing in Seattle, King County, Washington, on October 27, 1915.

"State of Washington,
County of King

AFFIDAVIT of GOOD FAITH.

J. E. Chilberg and Anna Chilberg, his wife, being first duly sworn on oath depose and say, and each says, that they are the persons who executed the foregoing Extension Agreement and each says that said Extension Agreement and also the mortgage of which the same is an extension were severally made in good faith and without any desire to hinder, delay or defraud creditors.

J. E. CHILBERG.
ANNA CHILBERG

Subscribed and sworn to before me this 27th day of October, 1915.

[Notarial Seal.] P. C. SHANSTROM,
A Notary Public in and for the State of Washington, Residing at Seattle, Wash. [925]

State of Washington,
County of Pierce,—ss.

W. H. Pringle and E. C. Johnson, being first duly sworn, depose and say that they are respectively the Vice President and the Cashier of Scandinavian-

American Bank of Tacoma, a corporation, and that they make this affidavit of Good Faith as such officers for and on behalf of said Bank; that the foregoing Extension Agreement and also the mortgage of which the same is an extension were made in good faith and without any design to hinder, delay or defraud creditors.

W. H. PRINGLE,
E. C. JOHNSON.

Subscribed and sworn to before me this 27th day of October, 1915.

[Notarial Seal.] H. BERG,
A Notary Public in and for the State of Washington, Residing in Tacoma.

Receiver's Exhibit No. 328.

"610390.

FOR VALUE RECEIVED, THE PENN-MUTUAL LIFE INSURANCE COMPANY, hereby sells, assigns, transfers and conveys to F. P. Haskell, Jr., as special deputy bank commissioner in charge of liquidation of SCANDINAVIAN-AMERICAN BANK OF TACOMA the following described Mortgage, together with the note and claim thereby secured, authorizing it to discharge the same as fully as said THE PENN MUTUAL LIFE INSURANCE COMPANY might or could do if these presents were not made without recourse

on the said THE PENN MUTUAL LIFE INSURANCE COMPANY in any event, to wit:

J. E. CHILBERG and ANNA CHILBERG Husband and Wife,

Mortgagors,

THE PENN MUTUAL LIFE INSURANCE COMPANY,

Mortgagee.

Date of Mortgage, September 2d, 1910. Recorded in Book 165, page 452 of the records of Mortgages in the office of the Auditor of Pierce County, Washington, Auditor's Fee No. 324812, on September 23d 1910, at 3:46 o'clock P. M.

Amount $100,000.00.

The property covered by said Mortgage in *in* Pierce County, Washington, and described as follows; to wit:

Lots numbered eleven (11) and twelve (12) in Block numbered one thousand and three (1003) in the City of Tacoma, as shown and designated upon a certain plat entitled "Map of New Tacoma, Washington, Territory," which plat was filed for record in the office of the Auditor of said County February 3d, 1875.

Dated at Philadelphia, Pennsylvania, this 25th day of February, A. D. 1921.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY, has caused these presents, to be signed by its —— President and attested by its —— secretary and sealed

with its [926] corporate seal being thereunto duly authorized.

THE PENN MUTUAL LIFE INSURANCE COMPANY.

By GEO. K. JOHNSON,
Its President.

Attest: SYDNEY A. SMITH,
Its Secretary.

[The Penn Mutual Life Insurance Company, Phila.] (D. R.)

Witnessess:

FRANK J. REEVES.

WM. H. BAKER, Jr.

Notary Public.

Commission expires February 24, 1923."

Acknowledged by George K. Johnson, President and Sydney A. Smith, Secretary, of the Penn Mutual Life Insurance Company, on January 25, 1921, before Frank J. Reeves, Notary Public residing at Philadelphia, Pennsylvania.

Receiver's Exhibit No. 329.

"FOR VALUE RECEIVED, the undersigned, F. P. Haskell, Jr., as Special Deputy Bank Commissioner in charge of the liquidation of the Scandinavian-American Bank of Tacoma, hereby sells, assigns, transfers and conveys to J. P. DUKE, as Supervisor of Banking of the State of Washington, in charge of the liquidation of the Scandinavian-American Bank of Tacoma, the following described

mortgage, together with the note and claim thereby secured, to wit:

J. E. CHILBERG and ANNA CHILBERG, Husband and Wife,

Mortgagors,

THE PENN MUTUAL LIFE INSURANCE COMPANY,

Mortgagee.

Date of Mortgage, September 2d, 1910, Recorded in Book 165, page 452 of the records of Mortgages, in the office of the Auditor of Pierce County, Washington, Auditor's Fee No. 324812, on September 23d, 1910, at 3:45 o'clock P. M.

Amount $100,000.00.

The property covered by said Mortgage is in Pierce County, Washington, and described as follows, to wit:

Lots numbered Eleven (11) and Twelve (12) in Block numbered One Thousand and Three (1003) in the City of Tacoma, as shown and designated upon a certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said County February 3d, 1875.

WHICH SAID MORTGAGE was assigned to the undersigned by the mortgagee therein named, the Penn Mutual Life Insurance Company, on the 25th day of February, 1921.

IN WITNESS WHEREOF the undersigned has hereunto set his hand and seal this 1st day of April, 1921.

F. P. HASKELL, Jr.,

As Special Deputy Bank Commissioner in Charge of the Liquidation of the Scandinavian-American Bank of Tacoma, an Insolvent Banking Corporation."

Acknowledged by F. P. Haskell, Jr., as Special Deputy Bank Commissioner in charge of the Liquidation of the Scandinavian-American Bank of Tacoma, on April 1, 1921, before Thomas MacMahon, Notary Public, residing at Tacoma, Washington. [927]

Testimony of Forbes P. Haskell, Jr., for the Receiver.

FORBES P. HASKELL, Jr., a witness called on behalf of the receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I purchased the Penn Mutual Mortgage, or took an assignment of it, the latter part of February, 1921. The entire mortgage was overdue, it carried 12% after maturity. I was notified I would have to pay 12% if the mortgage was not paid within a very short time. There is now due on this mortgage $75,345.32, figured to this date. I compromised by paying the Penn Mutual eight per cent and figured the interest on the amount I paid from that date to this date at 6%. At the time I took the assignment the interest amounted to $2,366.35. That mortgage has never been paid to anybody. I took the assignment in my own name as Special Deputy Bank Commissioner in charge of the liquidation of the Scandinavian-American Bank of Tacoma. That

(Testimony of Forbes P. Haskell.)
was purchased with money I had on hand as Deputy Supervisor which was collected by me from the assets of the bank during the process of liquidation.

Cross-examination.

(By Mr. METZGER.)

This interest, $2,366.35, was 8% interest on $70,-000 from the time the interest had last been paid to the time I paid it, I have figured interest at 6% on the entire amount I paid for the mortgage, 6% interest straight. At the time I took over this mortgage, the Penn Mutual was demanding action, they notified me that they would foreclose if it was not paid; they notified their agent here in town, Boyle & Company and Boyle came to me knowing that I was in charge of the bank's business, and probably was in touch with the Building [928] Company's business. The property had been deeded to the Building Company subject to this mortgage.

Cross-examination.

(By Mr. STILES.)

I have included in my figures interest on the interest which I paid, I assumed that in buying this assignment of this mortgage that if we figured interest at the rate of 6% on the principal, when I had a right to figure 12%, and chose to be satisfied with 6%, I would be justified in charging 6% on the entire amount that I had invested in the mortgage. The face amount of the mortgage due at the time I purchased it was $70,000.

Receiver's Exhibit No. 335.

(Exemplified Copy of the following order.)

"In the Superior Court of the State of Washington in and for the County of Pierce.

No. 47348.

In the Matter of the Insolvency of the SCANDI–NAVIAN–AMERICAN BANK OF TACOMA, Tacoma, Washington, a Corporation.

ORDER.

This matter coming on regularly to be heard this 23d day of February, 1921, on the motion of CLAUDE P. HAY, Bank Commissioner of the State of Washington, for an order authorizing and directing him to take up by assignment, or otherwise, the mortgage of Seventy Thousand ($70,000.00) Dollars existing against Lots eleven (11) and twelve (12) in Block One thousand three (1003) "Map of New Tacoma," W. T.; and it appearing to the Court that it is to the best interests of the creditors of the Scandinavian-American Bank of Tacoma, an insolvent banking corporation, that the Bank Commissioner be authorized and directed to take up said mortgage in order to prevent the foreclosure of the same and thereby incurring a tremendous amount of costs and attorneys' fees, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That the State Bank Commissioner be and he is hereby authorized and directed to

(Testimony of W. E. Morse.)
take up the said mortgage by assignment, or otherwise, and to pay therefor the principal sum of $70,000,00 together with the interest amounting to $2,275.00, together with New York exchange.

Done in open court this 23d day of February, 1921.

M. L. CLIFFORD,
Judge.

Ent. Jour. 181, page 142, Dept. 4, 1921.

Filed in the Superior Court Feb. 23, 1921. George F. Murray, Clerk. By Libby, Deputy." [929]

Testimony of W. E. Morse, for the Receiver.

W. E. MORSE, a witness called by the Receiver, being duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

The filing jacket, Exhibit 336 (Receiver), is an envelope that is used in our collateral files, to file our collateral to different notes. The slip on the face here is used for reference to the collateral and what note the collateral is securing, it is in my hand writing. The collateral contained in this envelope was collateral security to the note of $200,000 and bore Number R.—E.—232. R. E. stands for real estate and 232 is the number of the note.

Receiver's Exhibit No. 336.

"Scandinavian-American Bldg. Co. collateral R. E. note #232.

Note for $600,000 of the Scand. Amer. Bldg. Co. to G. Wallace Simpson.

(Testimony of W. E. Morse.)

Mtg. covering lots 10, 11, 12, Block 1003, Map of New Tacoma, W. T., and all buildings, equipment, etc.

Assignment of mtg. from G. Wallace Simpson to Scand. Amer. Bk. of Tacoma.

Mtge. filed in Pierce Co. Mar. 10, 1920, #553364."

This filing jacket was a part of the bank files. Kept there while I was there, the collateral files. This $200,000 item went through our records as a new note. In the customary way of handling notes, if a renewal is brought in, it replaces the one in our files that is due or past due. That was not done in this case. This amount of $200,000 was credited to the Scandinavian-American Building Company and a note of $100,000, and a note of $50,000 plus interest on each, were credited to the account. That was not considered the usual way of handling the notes in the note department, that being a renewal of those two notes, where there is a renewal, the new note is brought in and exchanged over the counter for the note that is in our files, and it is not credited to the account, and the old note is charged on. The old notes for [930] $150,000 were charged against this account for which credit was *passed* due, credit of the Scandinavian-American Building Company, I suppose those old notes went back into the files of the building company. I simply wrote on this note, "Scandinavian-American Building Company memo," there was no signature on it. This $200,000 note was never executed by the building company itself, but the note was passed to their credit

(Testimony of W. E. Morse.)

on the books. I do not consider this a note, it was a memorandum put among the notes, which were collaterally secured.

Cross-examination.

(By Mr. HOLT.)

I think the endorsement on this jacket was all written at the same time.

Cross-examination.

(By Mr. METZGER.)

Exhibit 185 shows that the $150,000 was charged up to the building company on the same day I passed on the credit to them on the strength of this memorandum note. [931]

Testimony of Forbes P. Haskell, Jr., for the Receiver. (Recalled).

FORBES P. HASKELL, Jr., being recalled, testified as follows:

Exhibit 338 (Receiver) is my check on the National Bank of Tacoma for $72,366.35, which I drew to the order of the National Bank of Tacoma for the purpose of buying the draft with which to purchase the mortgage from the Penn Mutual, assignment of the mortgage from the Penn Mutual.

Receiver's Exhibit No. 338.

"No. 157.

"Office of Bank Commissioner Liquidating Scandinavian-American Bank of Tacoma.
Tacoma, Washington.

Tacoma, Wash., Mar. 2, 1921.

PAY TO THE ORDER OF YOURSELVES $72,-366,35. Seventy-two Thousand Three Hundred Sixty-six Dollars *Dollars* Thirty-five cents.

For draft Penn Mutual Life Ins. Co., in payment of 1st mortgage on Property at 11th & Pac. Ave.
To National Bank of Tacoma 34–1.
Tacoma, Washington.

(Signed) F. P. HASKELL, Jr.,
Special Deputy Bank Commissioner."

I received the assignment of the mortgage marked Exhibit 339 (Receiver).

EXHIBIT No. 339.

This exhibit is the original of the assignment of mortgage, exemplified copy of which is hereinbefore set out as Receiver's Exhibit 329.

A telegram marked Exhibit 340 (Receiver) I found among the files of the bank.

Receiver's Exhibit No. 340.

Telegraph Blank of Western Union.

"A 10 4 PO 70 Blue

1919 Nov 11 PM 2 19

D San Francisco Calif 1135 A 11

O S Larson
Scandinavian Amn Bank Tacoma Wash.

Just had a talk with Mr. Metson regarding our

(Testimony of J. V. Sheldon.)

meeting yesterday in which Chilberg Lane and myself took part In view of the present outlook do not think advisable for you to proceed with building construction or anything which will have any tendency of tieing up money from your institution in Tacoma I will endeavor [932] to free all obligations from myself and my institutions due your bank at first opportunity

JAFET LINDBERG." [933]

Testimony of J. V. Sheldon, for the Receiver.

J. V. SHELDON, a witness called on behalf of the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

Exhibit 341 (Receiver) is a cashier's check, Scandinavian-American Bank, in favor of the Penn Mutual Life Insurance Company, $70,000.00. Attached to Exhibit 341 is a copy of a letter written by Mr. Larson to me under date of September 30, 1920. At that time Mr. Larson was in New York.

Receiver's Exhibit No. 341.

"SCANDINAVIAN-AMERICAN BANK OF TACOMA.

34-5

Tacoma, Washington, Sept. 8, 1920.

No. 35932.

Pay to the order of Penn Mutual Life Ins. Co.

$70,000.00/100. Seventy Thousand Dollars *Dollars.*

(Signed) N. A. DONELSON,

A. Cashier."

Cashier's Check.

The following endorsement appears on the back of the above check—"not used."

(Attached thereto:)

"September 30th, 1920.

Mr. J. V. Sheldon,
Vice-President
Scandinavian-American Bank,
Tacoma, Washington.

Dear Mr. Sheldon:

Enclosed herewith please find confirmation of telegram sent you this afternoon. We are returning herewith Cashier's check No. 35932 for Seventy thousand dollars ($70,000), issued September 8th, 1920, payable to the Penn Mutual Life Insurance Company.

The company have kindly consented to an indefinite extension of its payment. You will kindly have check cancelled upon receipt of this letter.

Mr. Simpson gave the Penn Mutual Life Insurance Company his personal check drawn on us for $1933.52. When this check comes through for payment will you kindly credit his account with this amount.

The receipt covering the interest payment is also herewith enclosed.

We have a meeting to-morrow morning with the officials of this same company, and have very good

hopes of securing an advance on our building mortgage in the sum of $400,000, in addition to the loan which they already have.

With best wishes, I am,

Very sincerely,"

OSL/NWS.

Enclosures." [934]

Exhibit No. 342 (Receiver) was a memorandum written to me by Mr. Larson on September 23d, just prior to going East.

Receiver's Exhibit No. 342.

"September 23, 1920.

Memorandum of Mr. Sheldon:

We should have the T. W. Little automobile account and all the others straightened out and put on a better footing, particularly the Pacific Car Company, and as soon as Mr. Davis comes home something ought to be done to get some of those cars moved and the bank line reduced. Leonard has promised to reduce $7,500 this month and $3,000 each month thereafter.

Have a conference with the County Commissioners regarding the McHugh contract, and ascertain definitely whether or not they are going to be able to pay McHugh any money as soon as the estimates are issued. McHugh has requested another $5,000 which I held off, telling him that we would investigate the condition in the courthouse before we went any further.

I wish you would go to Portland and if necessary, to Salem, on the Phez business and collect that

$40,000. The note is with the Northwestern National Bank and you might talk the matter over with Mr. Olmstead and see if you can get any more light on the subject from him.

Withhold payment of building vouchers until credit situation is straightened out and we are able to get an advance in large amount on the building mortgage. I do not see that any particular harm can come from this and as soon as I get East we will explain the matter to McClintic-Marshall in case they should become uneasy.

Get after the past due notes with Mr. Ogden and Mr. Bean and have them all renewed whenever they cannot be paid.

Bean has some blanks that he was working up on the Lindeberg line.

Try to induce the large borrowers to increase their balances like Lindberg, and others of the same stripe.

Yours very truly,

———————————,

President.

OSL:C.

Exhibit No. 343 (Receiver) is a telegram dated September 30th.

Receiver's Exhibit No. 343.

(The following is on regular Western Union telegram blank.)

"A131PO 38 Blue 1920 Sep 30 AM 10 55

Philadelphia Penn 107P 30

J V Sheldon

Scandinavian-American Bank Tacoma Wash.

Will interview comptroller of currency next week regarding National charter before examination loans should be reduced telegraph amount deposit to-day ascertain whether army bank designated Government depository good prospect securing temporary real *state* loan withhold payment steel invoices.

LARSON." [935]

Exhibit No. 344 (Receiver) is a telegram from Mr. Larson and signed "Jack." I asked him when he came back what was the reason for signing so and I think he told me it was just a mistake of the wire. I received it from him.

Receiver's Exhibit No. 344.

(The following is on regular Western Union telegram blank.)

"A288PO 34NL 1920 Oct 1 PM 4 41

BC Philadelphia Pa 1.

J V Sheldon

Scandinavian American Bank Tacoma Wash.

Get steel work started Monday sure Will arrive Chicago early Monday morning and will have substantial relief Tuesday or Wednesday Leaving here Sunday evening Get definite assurance from Nome covering boullion shipment Best wishes.

JACK."

Exhibit No. 345 (Receiver) is a telegram dated October 1st, 1920, which I received from Mr. Larson. During that period he was attempting to obtain an advance on the Simpson Mortgage.

(Testimony of J. V. Sheldon.)

Receiver's Exhibit No. 345.

(Following is on regular Western Union telegram blank.)

"A96PO47 1920 Oct 1 AM 10 24

BC Philadelphia Pa 101P 1

J V Sheldon

Scandinavian-American Bank Tacoma Wash.

Suggest offer exchange paper with Seattle securing temporary return of Liberty and municipal bonds for use with Tacoma pending large advance against building mortgage Unless we obtain action here to-morrow will go to Chicago Monday Instruct Allen Portland judgement will be adjusted when Lindberg returns from Nome.

O S LARSON."

(By the COURT.)

I had no understanding with Larson that when he sent a telegram signed Jack I would keep quiet about it, I showed him those wires upon his return and he told me that they were his wires. I called those to his attention upon his return. I did not say anything at that time about those two telegrams signed Jack indicating that I wondered why they were signed that way, I just thought there was some reason [936] that Larson signed them that way, so that possibly they would not be called to anybody's attention over the telephone line, something to that effect.

(By Mr. OAKLEY.)

Larson went East the latter part of September, I think on the 24th of September. At that time, I

(Testimony of J. V. Sheldon.)
had discussed with him the matter of taking an assignment of this mortgage and he went East to see if he could get some money in the East on the Simpson mortgage, and it was later than that we took the assignment. I think it was about October 7th. If I remember correctly he took the mortgage East with him to get an assignment from Simpson.

Exhibit 346 is a telegram I received from Mr. Larson, also signed "Jack."

Receiver's Exhibit No. 346.

(Following is on regular Postal Telegraph blank.)

"9zq— 73 N. L. 7–58 am— 8.
(G) Chicago, Ills. Oct. 7–20.

J. V. Sheldon,
Vice-Prest., Scan.-Amn. Bank, Tacoma, Wn.

Was in Milwaukee yesterday tried everything here without success Stop Penn. Mutual seriously interested one year loan details will have to be worked out with Boyle next week Stop Do nothing McClintic-Marshall until last car received Stop Simpson left for Boston to-day trying Evans estate Hancock and Massachusetts Mutual Stop Leaving for the West to-night all tired out spending Saturday and Sunday in Minnesota hunting for new inspirations.

Sincerely your friend,

JACK."

I received Exhibit No. 347 (Receiver), which is a telegram dated October 5th, from Larson.

(Testimony of J. V. Sheldon.)

Receiver's Exhibit No. 347.

(Following is on regular Postal Telegraph blank.)

"58zq— 74 Collect. 1–34 pm.

(G) Chicago, Ills. Oct. 5–20.

J V Sheldon,

V. P. Scan.-Amn. Bank, Tacoma, Wn.

You are allowed forwarding Banks note merchants loan and trust ninety days mixed collateral and have release and return Paulhamus notes now with them soon maturing Stop This will give you fruit notes free Stop Penna. Mutual extension and this all have been able accomplish to date Stop Telegraph [937] Metson Cross Lindblom Lindeberg that Pioneer output must be applied upon Seattle stock advances or suits will have to be brought against interested parties.

LARSON."

Cross-examination.

(By Mr. FLICK.)

When these various telegrams came I discussed them with the other directors. I think the other directors knew of it when Larson went East with this Simpson mortgage to get it assigned. The purpose was to get the money on the mortgage, to use the money on these building operations and to cancel the obligations the building company owed to the bank. If the card which you show me covers all the loans, it does not show a loan to the building on that date. This other card shows that

(Testimony of J. V. Sheldon.)

notes had been cancelled off from there and entered under stock and bonds. It does not show whether there was any overdraft at that time. At that time the bank apparently had no note obligations from the building company and owed all the stock of the building company, according to the books. I knew it but objected to it. At that time the bank also had the agreement of the building company to give it $350,000 of second mortgage bonds on the building, for which later Drury and I issued our notes for $365,000. I do not know whether that would be a substitute for the certificate or not, we executed that to the bank so they would have something to show for the transfer of the property in addition to the agreement and in addition to the stock that was on the books that way. I knew at that time that the $600,000 mortgage was to be a first lien upon the property. I assume all the directors knew that. And I knew there was the Penn Mutual mortgage which was to be wiped out eventually. The money derived from this $600,000 mortgage was not to be used as completion [938] money. There was to be an advance of that mortgage that was to be used in the construction. It is true that the Metropolitan Life Insurance Company never agreed to advance the money until the building was completed.

Redirect Examination.

(By Mr. OAKLEY.)

I remember the letter of June 21, 1920, from the Metropolitan Life Insurance Company to the bank

(Testimony of J. V. Sheldon.)

(Exhibit 214) and from that date on all the correspondence and these telegrams were directed to the attempt to obtain money from other sources before the bank had the assignment.

"Q. And not being able to get the money from other sources, the bank took the assignment to protect itself? A. That is true.

Mr. METZGER.—We object as calling for a conclusion of the witness.

The COURT.—Objection sustained.

Mr. METZGER.—I move to strike this answer.

The COURT.—The answer is all right so far as the attitude of the witness is concerned, that explains his conduct or his actions, but standing as an understanding of the situation it is objectionable.

Mr. OAKLEY.—It looks to me as though he is qualified to testify, as one of the vice-presidents of the institution and one of the trustees of the institution.

The COURT.—I will not strike out the answer, but I could not base a finding that the institution took it for the reason, right on that bald statement alone." (No exception asked or allowed.)

Cross-examination.

(By Mr. STILES.)

I should say that Larson was representing everybody concerned in the bank and the building company while he was in the East. I represented the bank, Mr. Larson and Mr. Drury were the active men in charge of the building company and it is true

(Testimony of J. V. Sheldon.)

that Mr. Larson was at that time the President and Manager of the bank and Mr. Drury was chairman of the Board and they were both officers of the building company. I believe [939] that all the directors of the bank knew that Drury and Larson were handling the affairs of the building company. Mr. Drury represented the building company in making these various transactions, notes and assignments of mortgage.

"Q. (By the COURT.) Was there anybody actively representing the building company, who was not prominently connected with the bank and responsible for the activities of the bank? A. No."

It is also a fact that Mr. Larson was the real active official of the bank in the sense of directing its policies, and he was really the active party directing the policies of the building company and these facts were known to both boards.

Cross-examination.

(By Mr. OAKLEY.)

The telegrams received by me, Exhibit 343, 345, 346, 347, so far as they refer to the securing of any advances, all referred to one proposition, about one proposition, about securing advances on this $600,-000 mortgage. [940]

Testimony of A. T. Geiger, for the Receiver.

A. T. GEIGER, a witness called by the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was note teller and assistant cashier of the Scandinavian-American Bank for over 12 years. I have made an examination of the records of the Scandinavian-American Bank of Tacoma to ascertain how much the Scandinavian-American Building Company was indebted to the bank on October 7th, 1920, and find that there was an overdraft of $93,196.61 and no loans. On October 17, 1920, there was an overdraft of $118,597.94 and no loans. On December 9, 1920, there was an advance of $200,000 and on the last day of December a check was taken from the building company and carried as we would a loan for $9,133.25. On January 15th, 1921, the day the bank was closed, the building company owed the bank $856,979.67. That amount includes the $200,000 stock transaction and the $350,000 second mortgage bond transaction. I did not go to the records of the bank to determine what was done in relation to the payment for the real property; I simply took the value of this property as it was carried on the books then and assumed that since they had given nothing for it that they therefore owed it. I think that this estimate of mine will really have to be corrected, and it would also have to be corrected as to the interest amount upon these prop-

(Testimony of A. T. Geiger.)

erties, except though, there is another item of $65,000 paid for the Drury lots. I made that statement showing what the bank had invested in the Building Company at that time. As far as the agreement, stock and other matters pertaining to that, I am not familiar. That is exactly how this shows on the books, as a debt owed by the building [941] company to the bank. It is an account on the books. The $9,133.00 check is carried as a loan to the Building Company on the bank's books, and represents interest on the indebtedness of the building company to the bank up to the 31st day of December, 1920, it is interest on the $200,000 item and the $350,000 item and the $65,000 item.

"Q. In other words, around toward the end of December, some time after the bank examiner had been there, a check was constructed by the Building Company for interest on these very three amounts we have been talking about; isn't that a fact?

A. Yes.

Q. And that is also in there? A. Yes.

Q. And up to that time none of these amounts had been carried in bills receivable, had they?

A. Let me see that statement.

Q. None of these three amounts, I believe (indicating).

A. The stock, the Banking-house or $65,000—no they were not carried as bills receivable."

This statement was then introduced in evidence as Exhibit 348, and is as follows:

Receiver's Exhibit No. 348.

"Scandinavian-American Building Company's Indebtedness to Scandinavian-American Bank of Tacoma on January 15, 1921.

	Prin.	Int.	Total
Stock	$200,000.	$500.	$200,500.
Int. 6% 12/31/20 to 1/15/21 15 days Loan	200,000.	1,200.	201,200.
Int. 6% 12/9/20 to 1/15/21 1 mo. 6 days Loan (check)..	9,133.25	22.83	9,156.08
Int. 6% 12/31/20 to 1/15/21 15 days Overdraft..........	32,746.42		32,746.42
Banking House	350,000.	875.	350,875.
Int. 6% days Scand. Amer. Bldg. Co. 12/31/20 to 1/15/21 days Scand. Amer. Bldg. Co....................	65,000.	162.50	65,162.50
Acct. on Genl. Ledger (Drury lot)			
Int. 6% 12/31/20 to 1/15/21 15 days			
	$856,879.67	$2,760.33	$859,640.00

[942]

Testimony of O. A. Jelleberg, for the Receiver.

O. A. JELLEBERG, a witness called on behalf of the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was employed by the Scandinavian-American Bank up to the time that it closed, as auditor and assistant cashier. Prior to June 16th, 1919, the capital stock of the Scandinavian-American Bank was $200,000. There were 53 stockholders. On June 16, 1919, it was increased to $400,000 and the trustees were Gustaf Lindberg, George Williamson, J. E. Chilberg, Chas. Drury, Jafet Lindeberg and James R. Thompson, who held altogether 601½

(Testimony of O. A. Jelleberg.)

shares of the par value of $100. After June 16, 1919, when it was increased to $400,000, there were 189 stockholders. The names of the directors and the number of shares held by them, respectively, are as follows:

Gustaf Lindberg	86½	shares
Charles Drury	150	"
O. S. Larson	41½	"
Frank Lamborne	100	"
George Williamson	20	"
Total	398	shares

so that the directors held 398 shares out of a total of 4,000 shares. On April 12th, 1920 the capital was increased from $400,000 to one million dollars. On January 1st, 1921, the trustees together with the amount of the stock owned by them were as follows:

Gustaf Lindberg	86½	shares
Dean Johnson	250	"
Charles Drury	50	"
J. V. Sheldon	100	"
O. S. Larson	1443½	"
Frank Lamborne	100	"
George Williamson	10	"

They held a total of 2040 out of 10,000 shares. At that time there were 526 stockholders. [943]

I made out the statement of the bank which was printed in accordance with the State law, and which is marked Exhibit 349 (Receiver). This statement is taken from the records of the bank. The $350,000 item is carried in that statement as Banking House and encumbrances. The $200,000

(Testimony of O. A. Jelleberg.)
stock item is in the total carried as stocks and securities. When this property was transferred to the Scandinavian-American Building Company it was not taken off of the books of the Scandinavian-American Bank.

Receiver's Exhibit No. 349.

Tacoma Daily Ledger, Nov. 30, 1920. (Advertisement).

"(Official Publication.)

Report of the Financial Condition of the
SCANDINAVIAN-AMERICAN BANK.

Located at Tacoma, Pierce County, State of Washington, at the close of business on the 15th day of November, 1920.

RESOURCES.

Loans and discounts, $4,250,700.17 less notes and bills rediscounted $265,900.00	$3,984,800.17
Overdrafts	56,792.96
Customers' liability account letters of credit and acceptances	NONE
U. S. Bonds, Certificates of Indebtedness, War Savings and Thrift Stamps	39,999.58
Stock of Federal Reserve Bank.....	NONE
Other bonds and warrants	1,250,066.56
Other stocks, securities, claims, judgments, etc.	566,656.88
Banking house, $280,000.00 plus encumbrances $70,000.00	350,000.00

(Testimony of O. A. Jelleberg.)

Other real estate owned, $223,938.19; less encumbrance, none	223,938.19
Furniture and fixtures	NONE
Cash on hand, clearing house items, and due from approved reserve agents (Legal reserve).........	605,768.16
Outside checks and other cash items..	192,565.10
Due from banks not approved reserve agents	5,859.45
Deposit with Guaranty Fund Board.	NONE
Expenses in excess of earnings......	2,196.51
Total	$7,278,643.56

LIABILITIES.

Capital stock paid in	$1,000,000.00
Surplus fund	210,000.00
Demand deposits	2,808,214.96
Time deposits	2,500,428.60
Bills payable	690,000.00
Mortgages payable	70,000.00
Total	$7,278,643.56"

Acknowledged by M. M. Ogden, Cashier, on November 29, 1920, before A. T. Geiger, Notary Public, residing at Tacoma.

"Correct, Attest: CHARLES DRURY,
O. S. LARSON,
Directors." [944]

Cross-examination.

(By Mr. HOLT.)

This item of $280,000 is supposed to be the cost

(Testimony of O. A. Jelleberg.)
of the property to the bank, plus the mortgage, so that if the bank paid the mortgage, the item would be $350,000.

Cross-examination.

(By Mr. FLICK.)

This $350,000 item was not duplicated in the securities for the reason that the $350,000 of second mortgage bonds had not been delivered to the bank. That statement contains the $200,000 stock item, as well as the total value of the lots. [945]

Testimony of C. C. Sharpe, for the Receiver.

C. C. SHARPE, a witness called on behalf of the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

Other charges of interest than the $9,133 charge were made on September 22d, 1920, $25,118.77 made up of the following details:

$769.17 was interest on the value of the Drury Lots, $65,000; $2,619.76, interest at 6% per annum from the date of various entries to the 31st day of July, 1920, on a total of $82,623.81; advanced by the Scandinavian-American Bank to the Scandinavian-American Building Company between October 14, 1919 and April 6th, 1920. $729.84 interest on some advances from July 31st, 1920 to September 22d, $21,000 was charged as interest on the banking house investment of $350,000 from December 1st, 1919 to December 1st, 1920, at 6%. These

(Testimony of O. A. Jelleberg.)

Other real estate owned, $223,938.19; less encumbrance, none	223,938.19
Furniture and fixtures	NONE
Cash on hand, clearing house items, and due from approved reserve agents (Legal reserve).........	605,768.16
Outside checks and other cash items..	192,565.10
Due from banks not approved reserve agents	5,859.45
Deposit with Guaranty Fund Board.	NONE
Expenses in excess of earnings......	2,196.51
Total	$7,278,643.56

LIABILITIES.

Capital stock paid in	$1,000,000.00
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Demand deposits	2,808,214.96
Time deposits	2,500,428.60
Bills payable	690,000.00
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Acknowledged by M. M. Ogden, Cashier, on November 29, 1920, before A. T. Geiger, Notary Public, residing at Tacoma.

"Correct, Attest: CHARLES DRURY,
O. S. LARSON,
Directors." [944]

Cross-examination.

(By Mr. HOLT.)

This item of $280,000 is supposed to be the cost

(Testimony of O. A. Jelleberg.)
of the property to the bank, plus the mortgage, so that if the bank paid the mortgage, the item would be $350,000.

Cross-examination.

(By Mr. FLICK.)

This $350,000 item was not duplicated in the securities for the reason that the $350,000 of second mortgage bonds had not been delivered to the bank. That statement contains the $200,000 stock item, as well as the total value of the lots. [945]

Testimony of C. C. Sharpe, for the Receiver.

C. C. SHARPE, a witness called on behalf of the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

Other charges of interest than the $9,133 charge were made on September 22d, 1920, $25,118.77 made up of the following details:

$769.17 was interest on the value of the Drury Lots, $65,000; $2,619.76, interest at 6% per annum from the date of various entries to the 31st day of July, 1920, on a total of $82,623.81; advanced by the Scandinavian-American Bank to the Scandinavian-American Building Company between October 14, 1919 and April 6th, 1920. $729.84 interest on some advances from July 31st, 1920 to September 22d, $21,000 was charged as interest on the banking house investment of $350,000 from December 1st, 1919 to December 1st, 1920, at 6%. These

(Testimony of C. C. Sharpe.)
charges were entered upon the books of the Scandinavian-American Building Company under Mr. Larson's direction.

Cross-examination.

(By Mr. FLICK.)

These entries were made on September 22d, 1920. The $9,133.00 interest charge should be in addition to that. The item of $82,623.81 was not all for building materials and labor there was included in that the expense of canceling leases of the old building; hotel and railway expenses for architects and others connected with the building company, $65,000 for the purchase of the Drury lots and various expenses in connection with the plans for the new building. Revenue stamps on mortgages, etc. The $65,000 item is, of course, the largest. No labor or material entered into this. There is the expense of fencing or board walk around the bank [946] building at the time they commenced to demolish the old building, $225.00, and this was all for expenses before the building was started.

Cross-examination.

(By Mr. METZGER.)

None of these items appeared on the books of the building company until I was directed to enter them in the latter part of September. There was nothing entered upon the books of the building company with reference to the liability for the payment of the three lots. I had nothing to do with the real estate except the payment of taxes

(Testimony of C. C. Sharpe.)

and had no record showing an obligation of $350,000 covering the purchase price of the three lots.

Cross-examination.

(By Mr. BONNEVILLE.)

In entering these items on the books I took Mr. Larson's instruction because he was actively engaged in the building company's work.

Cross-examination.

(By Mr. FLICK.)

I received instructions, also, from Mr. Drury, from time to time, as well as from Larson and other officers of the building company.

(By The COURT.)

The $21,000 item was interest on the banking house investment and does not include the Drury lot.

(By Mr. OAKLEY.)

On November 30, 1920, a check for $7,069.14 was made to the order of William Turner, County Treasurer, covering taxes on the lots, 11 and 12, for the year 1919, that does not include taxes on the Drury lot. That item was not included in the interest charges which I made a statement about.

The ledger sheet of the Scandinavian-American Building [947] Company from its books of account kept by witness was introduced and received in evidence as Exhibit No. 350. [948]

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(Testimony of C. C. Sharpe.)

Cross-examination.

(By Mr. STILES.)

That was paid by the check of the building company on the bank. At that time there was an overdraft of about $10,000. This amount of taxes was added to the overdraft. [949]

Testimony of A. T. Geiger, for the Receiver.

A. T. GEIGER, a witness called on behalf of the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

Exhibit No. 234 is the general ledger sheet of the account, stocks and securities of the bank, and it showed that under date of June 25, 1920, a charge of $200,000 to the account of stocks and securities for payment in full for stock subscriptions, Scandinavian-American Building Company.

Exhibit 351 (Flick) is another general sheet showing the charge of $65,000 under date of February 9th, 1920, for the purchase from Charles Drury and Drury The Tailor, of Lot No. 10. This is the general ledger sheet of the bank and not a real estate account. It is an account receivable, of the bank against the building company, there was interest charged on the account but it was apparently paid off because the balance in the account is $65,000. There is a charge against the building company on February 9th, 1920, for interest from December 1st, 1919 of $512.78, but there was an error in that, and under date of

(Testimony of A. T. Geiger.)
March 11th, 1920, it was corrected and there is a charge against the building company account, an additional charge for interest on the purchase of the Drury property of $276.33. It was not carried as a note, it was carried as an account against the building company.

Exhibit No. 351.

(Flick.)

Account of the Scandinavian-American Bank With the Scandinavian-American Building Company, Being Original Ledger Sheet of the Bank. [950]

"Date	Description of Items	Total Debits.	Dr. Balance
May 8, 1917.	Fw'd from old Ledger........		$210,000.
Aug. 24, 1917.	Payment of installment due Penn. Mutual Life Ins. Co. N. Y. on Mtg. Sep. 1, 1917, N. Y. draft..................	$10,000.	220,000.
Aug. 27, 1918.	Pt. payment 1st mtge. Ren. to Penn Mutual Life..........	5,000.	225,000.
Oct. 11, 1918.	Pmt. Second Mtg. note to Puget Sound Mtg. Co. by J. E. and Anna Chilberg...	50,000.	275,000.
Nov. 27, 1918.			
Aug. 26, 1919.	Pt. payment on mtge of $75,000 to Penn Mutual L. Ins. Co..	5,000.	280,000.

Balance Forwarded to New Ledger. [952]

The $350,000 item was not carried as an account. The $9,133.00 item for interest included interest on the $200,000 stock subscription and also interest on the $65,000 item and also on the $350,000 item. Exhibit No. 351 shows only the advance on the Drury lot.

Exhibit No. 352.

(Flick.)

Account of the Banking House of the Scandinavian-American Bank, Being Original Ledger Sheet of the Bank—Account No. 25, Sheet No. 1.

1216

ACCOUNT NO. [illegible]

SHEET NO. 1

TOTAL CREDITS	DR. BALANCE	CR. BALANCE
	14 059 50	
	14 449 03	
	14 574 02	
	80 186 50	
	81 136 60	
	81 296 60	
	81 599 49	
	81 928 13	

Testimony of Guy E. Kelly, for the Receiver.

GUY E. KELLY, a witness called on behalf of the Receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was appointed attorney for Mr. Haskell in liquidating the affairs of the Scandinavian-American Bank of Tacoma and found Exhibit No. 247, the note dated October 7th, 1920, signed by the Scandinavian-American Building Company, by Chas Drury, President, J. V. Shelton, Secretary, payable to the Scandinavian-American Bank of Tacoma in the sum of $363,825.00 two or three days after the 17th of January, 1921, when we went down there, among other papers in the bank in the vault.

Cross-examination.

(By Mr. METZGER.)

I think I found the $600,000 mortgage with the unrecorded assignment thereof at the same time and in the same tray that I found this note, but I would not be sure of that.

Cross-examination.

(By Mr. STILES.)

I have heard that the notation attached to this note was written either by Williamson or Freeman. Freeman, I think. [953]

Receiver's Exhibit No. 330.

SEAL OF THE STATE OF WASHINGTON.
CLAUDE P. HAY,
Bank Commissioner.

J. C. MINSHULL,
Deputy Bank Commissioner.

STATE OF WASHINGTON.
BANKING DEPARTMENT.
OLYMPIA.

No. 47348.

To Whom It May Concern: GREETING:

In compliance with the provisions of Chapter 80 of the Laws of 1917, of the State of Washington, and by virtue of the authority of said law, I hereby designate and appoint Forbes Haskell, Special Deputy Bank Commissioner, as agent to assist me in the duty of liquidating and distributing the assets of the Scandinavian-American Bank, a banking corporation of Tacoma, Washington, and this shall be evidence that said Forbes Haskell has full authority and power to perform any and all duties attached by law to said office of Special Deputy Bank Commissioner.

Given under my hand and official seal this SEVENTEENTH day of JANUARY, 1921.

CLAUDE P. HAY,
Bank Commissioner.

[Seal of Bank Commissioner of the State of Washington.]

Filed in Superior Court, Apr. 13, 1921. Geo. F. Murray, Clerk. W.A.S., Deputy. [954]

FOR PIERCE COUNTY.

No. 47348.

In the Matter of the Insolvency of the SCANDINAVIAN–AMERICAN BANK OF TACOMA, a Corp.

CERTIFICATE.

I, Geo. F. Murray, County Clerk, and by virtue of the laws of the State of Washington, *ex-officio* Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy of the ORDER APPOINTING FORBES HASKELL, special Deputy Bank Commissioner to assist in the duty of liquidating and distributing the assets of the Scandinavian-American Bank, a banking corporation of Tacoma, Washington, in the above-entitled action, as the same now appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 28th day of October, 1921.

[Seal] (Signed) GEO. F. MURRAY,
Clerk. [955]

This exhibit also contains a certificate of M. L. Clifford, Judge of the Superior Court of the State of Washington for Pierce County, in the effect that George F. Murray is the Clerk of the Superior

Court of said County and a certificate of said George F. Murray as Clerk of said Court to the effect that M. L. Clifford is Judge of said Court, both certificates being dated November 8, 1921.

Receiver's Exhibit No. 331.

SEAL OF THE STATE OF WASHINGTON.
CLAUDE P. HAY,
Bank Commissioner.

J. C. MINSHULL,
Deputy Bank Commissioner.

STATE OF WASHINGTON.
BANKING DEPARTMENT.
OLYMPIA.

No. 47348.

KNOW ALL MEN BY THESE PRESENTS: In compliance with the provisions of Chapter 7 of the laws of 1921 and by virtue of the authority of said law, I, John P. Duke, Supervisor of Banking of the State of Washington, do hereby certify that I have this day appointed Forbes P. Haskell, Jr., Special Deputy Supervisor of Banking in and for the liquidation of the business, assets and affairs of the Scandinavian-American Bank, an insolvent State Banking Corporation of Tacoma, Washington, with full power and authority to discharge all the duties of said office as provided by law. [956]

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supervisor of

(Testimony of Guy E. Kelly.)

Banking, at the Capitol in the City of Olympia, Washington, this 1st day of April, 1921.

JOHN P. DUKE,
Supervisor of Banking.

[Seal of Supervisor of Banking of the State of Washington.]

Approved:

E. L. FARNSWORTH,
Director of Taxation and Examination.

Filed in Superior Court. Apr. 13, 1921. Geo. F. Murray, Clerk. W. A. S., Deputy.

This exhibit is certified to by George F. Murray, Clerk of the Superior Court of the State of Washington, for Pierce County, on October 28, 1921, and also contains a certificate of M. L. Clifford, Judge of the Superior Court of the State of Washington for Pierce County, in the effect that George F. Murray is the Clerk of the Superior Court of said County and a certificate of said George F. Murray as Clerk of said Court to the effect that M. L. Clifford is Judge of said Court, both certificates being dated October 28, 1921. [957]

Receiver's Exhibit No. 332.

550216.

(Internal Revenue $65.00 Feb. 9 '20 D. T. T.)

The Grantor, Drury, The Tailor, Incorporated, a corporation organized under the laws of the State of Washington, having its principal place of business at Tacoma, County of Pierce, State of Washington, for and in consideration of Ten ($10.00)

Dollars in hand paid, hereby conveys and warrants to Scandinavian-American Building Company, a corporation the following described real estate situate in the County of Pierce, State of Washington, to wit:

Lot 10 in Block 1003 as the same is known, shown and designated upon a certain plat filed for record with the auditor of Pierce County, Washington, on February 3, 1875, entitled "Map of New Tacoma, W. T."

Subject to

Dated this 10th day of November, 1919.

Signed in the presence of:

DRURY, THE TAILOR, INCORPORATED. (Seal)

By CHARLES DRURY,
President. (Seal)

By WILLIAM DRURY,
Secretary. (Seal)

[Drury The Tailor, Inc.—Corporate Seal—Tacoma, Wash.]

State of Washington,
County of Pierce,—ss.

On this 10th day of November, 1919, before me personally appeared Charles Drury and William Drury to me known to be the President and Secretary respectively of the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instru-

ment and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

E. F. FREEMAN,

Notary Public in and for the State of Washington, Residing at Tacoma.

[E. F. Freeman, Notary Public, State of Washington.]

Commission expires Sept. 24, 1920. [958]

EXHIBIT 332 (Continued).

State of Washington,
County of Pierce,—ss.

I, C. A. Campbell, County Auditor in and for Pierce County, State of Washington do hereby certify that the within and foregoing is full, true and correct copy of that certain Deed filed for record in this office on the 9th day of February, 1920 at 3:24 P. M. and recorded in Volume 436, page 381 of Deed Records under Auditor's Fee No. 550216.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 8th day of November, A. D., 1921.

[Seal] (Signed) C. A. CAMPBELL,
Auditor, Pierce Co., Washington.

Compared by C. & G. [959]

EXHIBIT 332 (Continued).

In the Superior Court of the State of Washington for Pierce County.

State of Washington,
County of Pierce,—ss.

I, Ernest M. Card, Judge of the Superior Court of the State of Washington, for Pierce County, do hereby certify that C. A. Campbell, whose name is subscribed to the preceding exemplification, is the County Auditor of said Pierce County, and is the proper officer to make said exemplification, and that full faith and credit are due to his official acts.

I further certify that the seal attached to the exemplification, is the official seal of the County Auditor of said Pierce County, and that the attention thereof is due form and according to the form of attestation in this state, and is made by the proper officer.

[Seal] (Signed) ERNEST M. CARD,
Judge of the Superior Court.

Dated, Tacoma, Washington, this 8th day of November, A. D. 1921. [960]

In the Superior Court of the State of Washington in and for Pierce County.

State of Washington,
County of Pierce,—ss.

I, Geo. F. Murray, County Clerk, and *ex-officio* Clerk of the Superior Court of the State of Washington, for Pierce County, do hereby certify that

(Testimony of Guy E. Kelly.)

C. A. Campbell, whose name is subscribed to the preceding certificate, is Auditor in and for Pierce County, State of Washington, duly elected, sworn and qualified, and that the signature of said Auditor to said Certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Superior Court, at Tacoma, the County Seat of said County, this 8th day of November, 1921.

[Seal] (Signed) GEO. F. MURRAY,

County Clerk, and *ex-officio* Clerk of the Superior Court of the state of Washington, for Pierce County.

This exhibit also contains a certificate of Ernest M. Card, Judge of the Superior Court of the State of Washington for Pierce County, in the effect that George F. Murray is the Clerk of the Superior Court of said County and a certificate of said George F. Murray as Clerk of said Court to the effect that Ernest M. Card is Judge of said Court, both certificates being dated November 8th, 1921. [961]

Exhibits 237, 238, 239, 240, 244 and 245 were certified copies of the records of the Auditor of Pierce County, Washington, showing the various instruments affecting the title to the property which are set forth herein in full under Exhibits Nos. 322 to 329, inclusive. [962]

Exhibits 333 and 334 were exemplified copies of Exhibits 180 and 180½, heretofore set out herein. [963]

Minute-book of Scandinavian-American Building Company admitted as Exhibit 178 (Flick), as follows:

Exhibit No. 178. (Flick.)

MINUTE-BOOK OF SCANDINAVIAN-AMERICAN BUILDING COMPANY.

Contents:

Page 1. Certificate of Secretary of State showing filing of Articles of Incorporation Nov. 21, 1919.

Pages 2, 3, 4 and 5. Articles of Incorporation.

Page 6. Waiver of Notice of first meeting by Trustees Unsigned.

Page 7. Oaths of Office as trustees by Lindberg, Drury, Lindeberg and Williamson.

Page 8. Oath of Office as trustees by Thompson unexecuted.

Pages 9, 10. Minutes of first meeting of Trustees.

Pages 11 to 16. By-laws.

Page 18. License to do business, by Secretary of State.

Page 17. Stock Subscription.

Page 19. Minutes of special meeting of Trustees.

MINUTES OF FIRST MEETING OF THE BOARD OF TRUSTEES OF SCANDINAVIAN-AMERICAN BUILDING COMPANY.

The Board of Trustees of SCANDINAVIAN-AMERICAN BUILDING COMPANY met at room 320 Scandinavian-American Bank Building, Tacoma, Pierce County, Washington, on the 25th day of November, A. D. 1919, at the hour of 4:00 in the afternoon thereof, pursuant to agreement and

to written waiver of notice and consent to the holding of the meeting at the time and place above stated.

The following trustees were present, viz:

J. E. Chilberg. O. S. Larson.
Gustaf Lindberg. George G. Williamson.
Charles Drury.

The foregoing named trustees having taken and subscribed to the oath of trustees, proceeded to organize the board by the election of J. E. Chilberg as temporary chairman and O. S. Larson as temporary secretary.

Election of Officers:

President: Drury.
Vice-President: Lindberg.
Secretary: Sheldon.
Treasurer: Ogden.

The subscription to the capital stock of the corporation heretofore made was then canvassed and it appearing that all of the capital of the corporation having been subscribed for, on motion duly and regularly made, seconded and carried, the subscription to the [964] capital stock of the corporation was duly ratified, approved and confirmed.

By-Laws Adopted.

General Discussion of Plans, adjourned to call of President.

CHARLES DRURY,
President.

Attest:————————

Secretary.

[Indorsed]: Filed in the United States District Court, Western District of Washington. Oct. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [965]

Certificate and Order Settling and Allowing Statement of Testimony.

This cause came on regularly to be heard this 9th day of October, 1922, pursuant to an order of this Court made and entered in this cause and action on September 6th, 1922, fixing the time for settling and approving the statement of evidence to become a part of the record on appeal of said Court, and it appears to the Court that notice of said hearing and order was duly served upon all parties appearing in this cause; and that written admission of said service is now on file in this cause, and it appearing to the Court that statements of evidence in this cause have been duly and timely lodged in the Office of the Clerk of this Court by appellants, Tacoma Millwork & Supply Company on June 12, 1922; by Ben Olson Company on June 15, 1922; by J. P. Duke, as Supervisor of Banks of the State of Washington on June 29, 1922; by F. P. Haskell, Jr., Receiver of Scandinavian-American Building Company on June 29, 1922, and by Washington Brick Lime and Sewer Pipe Company on July 10, 1922, and due notice of the lodgment of said respective statements of evidence having been regularly served upon all parties; and the complainant, [966] McClintic Marshall Company, and others

have filed objections and amendments to said statements of evidence and the Court having heretofore considered and settled some of the proposed objections and amendments in open Court and ordered that all of the evidence material to an appeal should be embodied in one statement of the testimony, and the same having now been satisfactorily adjusted and settled to conform with all objections as settled; and it further appears to the Court that the foregoing contains all of the testimony material to the hearing of the appeals in said cause, in narrative form and where the testimony herein is set forth in the form of questions and answers it is so set forth that the evidence might be clearly understood.

IT IS THEREFORE ORDERED, that the same be and hereby is settled, approved and allowed as a true, complete and correct statement of all the evidence introduced in said cause material to the hearing of the appeals of Tacoma Millwork & Supply Company, Ben Olson Company, J. P. Duke, as Supervisor of Banks of the State of Washington, F. P. Haskell, Jr., Receiver of Scandinavian-American Building Company and Washington Brick Lime & Sewer Pipe Company.

Done in Open Court this 9th day of October, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division, Oct. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [967]

Petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company, and Washington Brick, Lime & Sewer Pipe Company for Order Extending Time to File Record on Appeal.

The petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company, and Washington Brick, Lime & Sewer Pipe Company respectfully shows that on the 3d day of May, 1922, a decree, denying to the petitioners herein the relief prayed for in their respective answers and cross-complaints, was entered by this court in the above-entitled action, and your petitioners further show that appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit have been heretofore allowed by your Honor, and that citations have been issued by your Honor for all of the undersigned petitioners. And that subsequently your Honor extended said return days upon all of said citations to the 16th day of October, 1922.

That your Honor, pursuant to orders extending time theretofore entered, settled and approved the

statement of [968] evidence on the 9th day of October, 1922.

Your petitioners further show that because of the great number of pleadings and exhibits which are in the record of the trial of the cause before your Honor, and because of the largeness of said record, your petitioners will not be able to file the same in the Circuit Court of Appeals as aforesaid by the 16th day of October, 1922.

The premises considered, your petitioners pray that they be granted an enlargement of time in which to file the record in said Circuit Court of Appeals for the Ninth Circuit, and that they be allowed thirty days from the 16th day of October, 1922, in addition to the time allowed by law, and as in duty bound your petitioners will ever pray, etc.

KELLY & MacMAHON and
F. D. OAKLEY,
Solicitors for James P. Duke, Supervisor of Banking of the State of Washington.

KELLY & MacMAHON,
Solicitors for Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company.

EDWIN H. FLICK,
Solicitors for Tacoma Millwork Company.

STILES & LATCHAM,
Solicitors for Ben Olson Company.

CHARLES P. LUND,
DAVIS & NEAL,
Solicitors for the Washington Brick, Lime & Sewer Pipe Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 13, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [969]

Order Allowing Additional Time to File Record.

This cause came on to be heard on the petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company and the Washington Brick Lime & Sewer Pipe Company, defendants and cross-complainants and appellants in the above-entitled cause, praying for an enlargement of time in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

And it appearing to the Court that by reason of the great volume of pleadings and exhibits and of the record, the said appellants will not have time to file the same in the Circuit Court of Appeals of the United States for the Ninth Circuit by the 16th day of October, 1922, which is the time required by law, as extended by order of this court,—

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said appellants be and they are hereby allowed, in addition to the time allowed by law, as heretofore extended by this Court, thirty days from the 16th day of October, 1922, in which to file the record in this cause in

the Circuit Court of Appeals of the United States for the Ninth Circuit.

Done in open court this 13th day of October, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 13, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [970]

Praecipe for Transcript of Record (Forbes P. Haskell, Jr.).

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the petition for appeal and the order heretofore entered by said Court allowing said appeal on behalf of Forbes P. Haskell, Jr., as Receiver of Scandinavian-American Building Company, a corporation, and include in said transcript, the following pleadings, proceedings, and papers on file, to wit:

1. Bill of complaint.
2. Motion to dismiss complaint Feb. 7, 1921.
3. Order denying motion to dismiss complaint.
4. Order permitting plaintiff to file amended complaint.
5. Amended complaint.

6. Order appointing Forbes P. Haskell, Jr., Receiver.
7. Order granting leave to sue receiver.
8. Amended answer to amended and supplemental bill of complaint of E. E. Davis & Co. Oct. 19, 1921.
9. Answer to Scandinavian-American Building Company [971] and F. P. Haskell, Jr., as Receiver, to cross-complaint of E. E. Davis & Co.
10. Answer of Scandinavian-American Building Company and F. P. Haskell, Jr., as Receiver, to amended complaint.
11. Motion to strike part of said answer.
12. Order granting motion to strike filed June 27, 1921.
13. Reply of McClintic-Marshall Company to the above answer.
14. Memorandum opinion of the Court.
15. Decree.
16. Order correcting decree.
17. Petition of Forbes P. Haskell, Jr., as Receiver of Scandinavian-American Building Company, a corporation, for appeal.
18. Order allowing above appeal and fixing bond.
19. Bond on appeal.
20. Assignments of error on above appeal.
21. Order continuing cause over term, June 30, 1922.
22. Notice of lodgment of statement of evidence, and acknowledgment of service thereof.
23. Order extending time for filing record, Aug. 30, 1922.

24. Order extending time for filing record, Sept. 6, 1922.
25. Acknowledgment of service of notice of above order of September 6, 1922.
26. Order fixing time for settling and approving statement of evidence.
27. Statement of testimony.
28. Certificate and order settling and allowing statement of testimony.
29. Petition for extending time to file record.
30. Order extending time for filing record, Oct. 13, 1922.
31. Stipulation to omit captions, verifications, etc., from the printed records.
32. Citation issued on behalf of Forbes P. Haskell, Jr., herein above-named and admission of service thereof. [972]
33. Praecipe for transcript of record and acknowledgment of service thereof.
34. Clerk's certificate to transcript of record.

Said transcript to be prepared as required by law and the rule of the United States Circuit Court of Appeals for the Ninth Circuit.

F. D. OAKLEY,

Attorney for F. P. Haskell, Jr., Receiver.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [973]

Praecipe for Transcript of Record (Tacoma Millwork Supply Company).

To the Clerk of the United States District Court for the Western District of Washington, Southern Division:

You are respectfully requested to make up a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed the Tacoma Millwork Supply Company, among others, in the above-entitled cause, and to include in such transcript of record the following papers and exhibits, to wit:

1. Complainant's amended bill.
2. Cross-complaint and amended cross-complaint and answer of Tacoma Millwork Supply Company.
3. Contract of complainant with Building Company.
4. Memorandum opinion by Court.
5. Exceptions to memorandum opinion.
6. Decree.
7. Exceptions to decree.
8. Notice of appeal.
9. Order allowing appeal.
10. Order enlarging time for preparation and filing of record.
11. Second order enlarging time for preparation and filing of record until July 21st, 1922.
12. Order allowing separate appeal and for diminution of the record.
13. Appeal and cost bond with approval of Court.

14. Assignments of error.
15. Citation.
16. Proof of service of citation.
17. Stipulation waiving captions and waiving printing of certain portions of record.
18. Stipulation to forward and for use of original exhibits and waiving printing of same.
19. Order to forward original exhibits and directions that same need not be printed.
20. Order that captions on certain pleadings may be omitted, and that only certain exhibits or parts thereof need be printed.
21. Notice of lodging of statement of facts.
22. Order continuing time for preparation and filing record to October ——, 1922.
23. Certificate and order settling and allowing statement of facts.
24. Certificate of clerk to transcript.

EDWIN H. FLICK,

Attorney for Tacoma Millwork Supply Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 28, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [974]

Praecipe for Transcript of Record (Washington Brick, Lime & Sewer Pipe Company).

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for

the Ninth Judicial Circuit, pursuant to the petition for appeal and the order allowing the same heretofore entered by said court on behalf of the Washington Brick, Lime & Sewer Pipe Company, a corporation; and include in said transcript the following pleadings, proceedings and papers on file, to wit:

(1) Amended bill of complaint.

(2) Order March 23, 1921, appointing Forbes P. Haskell, Jr., as Receiver.

(3) Order May 21, 1921, making Forbes P. Haskell, Jr., as Receiver, party defendant.

(4) Order June 14, 1921, granting leave to sue Receiver and consent thereto.

(5) Answer and cross-complaint of Washington Brick, Lime and Sewer Pipe Company.

(6) Answer of Scandinavian-American Building Company and Forbes P. Haskell, Jr., as Receiver thereof to the cross-complaint of the Washington Brick, Lime & Sewer Pipe Company.

(6½) Answer of J. P. Duke as Supervisor.

(7) Reply of McClintic-Marshall Company to cross-complaint of Washington Brick, Lime & Sewer Pipe Co.

(8) Answer and cross-complaint of Far West Clay Co.

(9) Stipulation adopting cross-complaint of Far West Clay Company by other defendants.

(10) Stipulation avoiding cross-complaints between defendants. [975]

(11) Memorandum opinion of the Court.

(12) Decree .
(13) Order correcting decree.
(14) Assignment of errors.
(15) Notice of filing assignment of errors and lodgment of statement of evidence.
(16) Proof of service of citation, notice of filing assignment of errors and lodgment of statement of facts.
(17) Petition for appeal and order allowing same and fixing bond.
(18) Bond on appeal.
(19) Citation on appeal.
(20) Order carrying matter over term—June 30, 1922.
(21) Order extending time for filing record—August 30, 1922.
(22) Petition for extension of time to Oct. 9, 1922.
(23) Order fixing Oct. 9, 1922, as time for settlement of evidence—Sept. 6, 1922.
(24) Order extending time for settlement of statements of evidence to Oct. 9, 1922, and admission of service.
(25) Statement of evidence.
(26) Order extending time for filing record to Oct. 16, 1922.
(27) Petition for extension of time to file record — Oct. 13, 1922.
(28) Order extending time for filing record to Nov. 15, 1922.
(29) Stipulation August 18, 1922, as to omission of captions, etc.

(30) Praecipe for transcript of record and proof of service thereof.

CHARLES P. LUND,
DAVIS & NEAL,

Attorneys for Washington Brick, Lime and Sewer Pipe Company, Appellants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 28, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [976]

Praecipe for Transcript of Record (Ben Olson Company).

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the petition for appeal and the order heretofore entered by said court allowing said appeal on behalf of Ben Olson Company, a corporation, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Amended bill of complaint.
2. Answer and cross-complaint of Ben Olson Company.
3. Order allowing Ben Olson Company to amend answer and cross-complaint.
4. Amended answer and cross-complaint of Ben Olson Company with admissions of service thereof.

5. McClintic-Marshall Company's reply to amended answer of Ben Olson Company.
6. Answer and cross-complaint of J. P. Duke and Scandinavian-American Bank of Tacoma.
7. Answer of F. P. Haskell and Scandinavian-American Building Company.
8. Answer and cross-complaint of Far West Clay Company to complaint.
9. Answer of Far West Clay Company to cross-complaint of Scandinavian-American Bank and J. P. Duke.
10. Stipulation adopting above (9), as answer of all other parties.
11. Memorandum opinion of the Court.
12. Decree.
13. Order correcting decree.
14. Petition for appeal of Ben Olson Company and order allowing same and fixing bond.
15. Assignment of errors—Ben Olson Company.
16. Citation and admission of service thereof—Ben Olson Company.
17. Bond on appeal—Ben Olson Company. [977]
18. Statement of evidence.
19. Order continuing cause over term—June 30, 1922.
20. Notice of lodgment of statement of evidence, by Ben Olson Company, and service thereof.
21. Order extending time for filing record on appeal—August 30, 1922.
22. Order extending time for filing record—Sept. 6, 1922, and acknowledgment of service thereof.
23. Order fixing time for settling and approvement of statement on appeal.

24. Certificate and order settling and allowing statement of testimony on appeal.
25. Petition for extension of time to file record.
26. Order extending same—Oct. 15, 1922.
27. Stipulation to omit captions, verifications and from printing records.
28. Praecipe for transcript—Ben Olson Company.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Respectfully,

STILES & LATCHAM,

Attorneys for Ben Olson Company, Defendant and Cross-complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [978]

Praecipe for Transcript of Record (J. P. Duke).

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the petition for appeal and the order heretofore entered by said Court allowing said appeal on behalf of J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendants Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Wash-

ington, and Scandinavian-American Bank of Tacoma, a corporation, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Bill of complaint.
2. Amended complaint.
3. Answer and cross-complaint of J. P. Duke and Scandinavian-American Bank of Tacoma.
4. Acknowledgment of service of above cross-complaint and appearance and waiver.
5. Order appointing F. P. Haskell, Jr., receiver. [979]
6. Order granting leave to sue receiver.
7. Order permitting plaintiff to file amended complaint.
8. Motion to strike part of above cross-complaint.
9. Order granting motion to strike—June 27, 1921.
10. Reply of McClintic-Marshall Co. to the above cross-complaint.
11. Answer of E. E. Davis & Co. to the above cross-complaint.
12. Answer of Far West Clay Company to the above cross-complaint.
13. Stipulation adopting answer of Far West Clay Co.
14. Memorandum opinion of the Court.
15. Decree.
16. Order correcting decree.
17. Petition of J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendants, Claude P. Hay, as State Bank Commissioner of the State

of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, for appeal.

18. Order allowing above appeal and fixing bond.
19. Bond on appeal.
20. Assignments of error on above appeal.
21. Order continuing cause over term—June 30, 1922.
22. Notice of lodgment of statement of evidence, and acknowledgment of service thereof.
23. Order extending time for filing record—Aug. 30, 1922.
24. Order extending time for filing record—Sept. 6, 1922.
25. Acknowledgment of service of notice of above order of September 6, 1922.
26. Order fixing time for settling and approving statement of evidence.
27. Statement of testimony.
28. Certificate and order settling and allowing statement of testimony.
29. Petition for extending time to file record.
30. Order extending time for filing record—Oct. 13, 1922. [980]
31. Stipulation to omit captions, verifications, etc., from the printed record.
32. Citation issued on behalf of J. P. Duke, et al., herein above named and admission of service thereof.

33. Praecipe for transcript of record and acknowledgment of service thereof.
34. Clerk's certificate to transcript of record.

Said transcript to be prepared as required by law and the rule of the United States Circuit Court of Appeals for the Ninth Circuit.

F. D. OAKLEY,
Attorneys for J. P. Duke et al., Defendants and Cross-complainants Above Named.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [981]

Praecipe for Transcript of Record (McClintic-Marshall Company).

To the Clerk of the Above-entitled Court:

YOU ARE HEREBY REQUESTED TO MAKE a transcript of record, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause to McClintic-Marshall Company, complainant, and E. E. Davis & Company and Far West Clay Company, defendants therein, and to include in such transcript of record the following papers, now on file in your office:

1. Complainant's original complaint.
2. Order permitting filing of amended complaint.
3. Amended complaint.

4. Answer and cross-complaint of Ann Davis and R. T. Davis, Jr., and others as Tacoma Millwork Supply Company.
5. Reply of Complainant to cross-complaint of Ann Davis, et al.
6. Amended answer and supplemental complaint of Ann Davis, et al., as Tacoma Millwork Supply Company.
7. Reply of complaint to said amended answer and supplemental complaint.
8. Answer of Far West Clay Company to answer and cross-complaint [982] of Ann Davis, et al., as Tacoma Millwork Supply Company.
9. Answer of E. E. Davis & Company to answer and cross-complaint of Ann Davis et al. as Tacoma Millwork Supply Company.
10. Answer of Far West Clay Company to cross-complaint of John P. Duke as State Supervisor of Banking.
11. Stipulation adopting said answer of Far West Clay Company on behalf of other parties to the cause.
12. Order of October 14, 1921, approving and ratifying such stipulation.
13. Affidavit of Maurice A. Langhorne, sworn to February 28, 1921, and filed the same day, relative to the appointment of the Receiver.
14. Order appointing receiver for Scandinavian-American Building Company, dated March 23, 1921.

15. Order making such receiver party defendant in this cause, dated May 21, 1921.
16. Order of June 14, 1921, granting leave to sue receiver with the consent of complainant and such receiver appended thereto.
17. Order of June 27, 1921, granting complainant leave to sue receiver and to amend its amended complaint by interlineation.
18. Last four paragraphs of memorandum brief of Tacoma Millwork Supply Company in Reply to mathematical computations and other data submitted by Hayden, Langhorne & Metzger, beginning with the paragraph commencing "thus in his computations."
19. First four pages of brief of Tacoma Millwork Supply [983] Company entitled "Answer to claim made by Mr. Metzger that we have exceeded the contract prices in our demands under the reasonable values shown," to the caption "Delivery" on the 4th page thereof.
20. Court's memorandum decision.
21. Decree.
22. Order correcting decree.
23. Petition of McClintic-Marshall Company et al. for appeal and order allowing appeal.
24. Bond on appeal.
25. Assignment of errors on appeal of McClintic-Marshall Company et al.
26. Notice of lodgment of statement of evidence on behalf of McClintic-Marshall Company et al.

27. Order to show cause as to statement of evidence on behalf of McClintic-Marshall Company et al.
28. Stipulation relative to evidence on appeal of McClintic-Marshall Company et al.
29. Order settling and certifying said evidence.
30. Citation on appeal of McClintic-Marshall Company et al.
31. Acknowledgment of service of citation on appeal and order to show cause as to statement of evidence.
32. Stipulation for omission of captions and verifications on all papers included in printed transcript.
33. Praecipe of McClintic-Marshall Company et al.
34. Acknowledgment of service of praecipes of several appellants.
35. Stipulation for consolidated transcript of record and for the omission therefrom of papers duplicated in the [984] several praecipes of the different appellants.
36. Stipulation for transmission of original exhibits to Circuit Court of Appeals.
37. Order directing the transmission of certain original exhibits to Circuit Court of Appeals.

38. Clerk's certificate to transcript of record.

HAYDEN, LANGHORNE & METZGER,
Attorneys for McClintic-Marshall Co., Complainant.
JAMES W. REYNOLDS,
PETERS & POWELL,
Attorneys for E. E. Davis & Co.
R. S. HOLT,
Attorney for Far West Clay Co.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 2, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [985]

Stipulation as to Printing of Record.

It is hereby stipulated and agreed by the undersigned who constitute all of the parties complainant and defendant and cross-complainants in the above-entitled action, that all captions and verifications to all complaints, cross-complaints, motions, orders and other pleadings and papers which shall be printed in the transcript of record on the appeal of the above-entitled action, to the United States Circuit Court of Appeals for the Ninth Circuit, may be omitted and not printed in said transcript of record.

HAYDEN, LANGHORNE & METZGER,
Attorneys for Complainant.
F. D. OAKLEY,
KELLY & MacMAHON,
Attorneys for Scandinavian-American Building Company and for Forest P. Haskell, Its Receiver.

FITCH & ARNSTON,
R. S. HOLT,
Attorneys for Savage-Scofield Co.
JAMES W. REYNOLDS,
Attorney for E. E. Davis & Co.
R. S. HOLT,
Attorney for Far West Clay Co.
W. W. KEYES,
Attorney for Hunt & Mottet.
DAVIS & NEAL,
Attorneys for Washington Brick, Lime & Sewer Pipe Co.
A. O. BURMEISTER,
Attorney for United States Machine & Engineering Co.
LYLE, HENDERSON & CARNAHAN,
Attorneys for Tacoma Shipbuilding Company.
FLICK & PAUL,
Attorneys for Tacoma Millwork Supply Co.
F. D. OAKLEY,
KELLY & MacMAHON,
Attorneys for Scandinavian-American Bank of Tacoma, Claude P. Hay, Forbes P. Haskell, Deputy State Bank Comm., John P. Duke, Supervisor of Banking, et al.
BATES & PETERSON,
Attorneys for Puget Sound Iron & Steel Works.
HERBERT S. GRIGGS,
L. R. BONNEVILLE,
Attorneys for St. Paul & Tacoma Lumber Company.

W. W. KEYES,
Attorney for Henry Mohr Hardware Company.
WALTER M. HARVEY,
Attorney for Edward Miller Cornice & Roofing Company.
BOGLE, MERRITT & BOGLE,
Attorney for Otis Elevator Co.
GROSSCUP & MORROW,
Attorney for Colby Star Manufacturing Company.
[986]
STILES & LATCHAM,
Attorney for Ben Olson Co. & F. H. Godfrey.
E. N. EISENHOWER,
Attorney for Ajax Electric Company.
TEATS, TEATS & TEATS,
Attorney for J. D. Mullins Bros.
LOUIS J. MUSCIK,
Attorney for Liberty Lumber & Fuel Company.
TUCKER & HYLAND,
Attorneys for O. S. Larson.
HERR, BAYLEY & CROSON,
Attorney for Seattle Hardware Company.
CHAS. BEDFORD,
Attorney for N. A. Hansen, et al. All Included as Defendants in Cross-complaint.
S. F. McANALLY,
Attorney for C. H. Boedecker, Wm. L. Owen, et al.
WALTER S. FULTON,
Attorney for Crane Company.
H. A. P. MYERS,
Attorney for H. C. Greene Iron Works.

BURKEY, O'BRIEN & BURKEY,
Attorney for City Lumber Agency.
GROSSCUP & MORROW,
Attorney for P. & G. Lumber Co.
L. R. BONNEVILLE,
Attorney for Davis & Neal.
D. R. HOPPE,
Attorney for Theodore Hedlund.
BAUSMAN O. B. & E.,
Attorneys for Frederick Webber.
HARTMAN & HARTMAN,
Attorney for W. E. Morris.
DeWITT M. EVANS,
Attorney for F. R. Schoen.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 19, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [987]

Admission of Service of Praecipes.

The undersigned hereby acknowledge service, by receipt of copy thereof, of the several Praecipes filed with the Clerk of the above-entitled court for transcript of record by John P. Duke, as Supervisor of Banking of the State of Washington; Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company; Tacoma Millwork & Supply Company; Ben Olson Company, a corporation; Washington Brick, Lime & Sewer Pipe Company, a corporation; McClintic-Marshall Company, a corporation; E. E. Davis & Company, a corporation;

and Far West Clay Company, a corporation, this 31st day of October, 1922.

HAYDEN, LANGHORNE & METZGER,
Attorneys for McClintic-Marshall Company.

F. D. OAKLEY,
Attorneys for Scandinavian-American Bldg. Co., Scandinavian-American Bank.

EDWIN H. FLICK,
Attorneys for Ann Davis, et al., as Tacoma Millwork Supply Co.

GROSSCUP & MORROW,
Attorneys for Colby Star Mfg. Co.; S. J. Pritchard and C. H. Graves, as P. & G. Lumber Co.

L. R. BONNEVILLE,
DAVIS & NEAL,
Attorneys for Davis & Neal.

LYLE, HENDERSON & CARNAHAN,
Attorneys for Tacoma Shipbuilding Co.

FITCH & ARNTSON,
Attorneys for Savage-Scofield Co.

TEATS, TEATS & TEATS,
Attorneys for J. D. Mullins Bros.

BATES & PETERSON,
Attorneys for Puget Sound Iron & Steel Works.

JAMES W. REYNOLDS and
PETERS & POWELL,
Attorneys for E. E. Davis & Co. [988]

HERBERT S. GRIGGS,
L. R. BONNEVILLE,
Attorneys for St. Paul & Tac. Lbr. Co.

R. S. HOLT,

Attorney for Far West Clay Co.

W. W. KEYES,

Attorney for Henry Mohr Hardware Co. and Hunt & Mottet.

WALTER M. HARVEY,

Attorney for Edward Miller Cornice & Roofing Co.

H. A. P. MYERS,

Attorney for H. C. Greene Iron Works.

E. N. EISENHOWER,

Attorney for Carl Gebbers, Doing Business as Ajax Electric Company.

BURKEY, O'BRIEN & BURKEY,

Attorneys for City Lumber Agency.

BOGLE, MERRITT & BOGLE,

Attorneys for Otis Elevator Co.

LOUIS J. MUSCEK,

Attorney for Liberty Lumber & Fuel Co.

A. O. BURMEISTER,

Attorney for U. S. Machine & Engineering Co.

DE WITT M. EVANS,

Attorney for F. R. Schoen.

D. R. HOPPE,

Attorney for Atlas Paint Company.

S. F. McANALLY,

Attorney for C. H. Boedecker and Wm. L. Owen.

HERR, BAYLEY & CROSON,

Attorneys for Seattle Hardware Co.

D. R. HOPPE,

Attorney for Atlas Paint Company and Theodore Hedlund.

TUCKER & HYLAND,

Attorney for O. S. Larson.

See above,

Attorney for Theodore Hedlund.

J. M. LOCKERBY,

Attorney for West Coast Monumental Co., J. A. Soderquist. [989]

BAUSMAN, OLDHAM, BULLITT & EGGERMAN,

Attorneys for Frederick Webber, Sherman Wells and Geo. Simpson.

CHAS. P. LUND,

DAVIS & NEAL,

L. R. BONNEVILLE,

Attorneys for Washington Brick, Lime & Sewer Pipe Company.

CHAS. BEDFORD,

Attorney for N. A. Hansen; A. J. Buskirk; C. W. Crouse; F. L. Swain; D. A. Trolson; Fred Gustafson; E. Scheibal; Paul Scheibal; F. K. Kadza; N. Donellan; P. Hagstrom; Arthur Purvis; Roy Farnsworth; C. B. Dustin; L. J. Pettifer; Chas. Bon; L. H. Breton; W. Canaday; L. R. Lilly; F. McNair, Dave Shields, Ed Lindberg; Joe Tikalsky; F. Mente; C. Gustafson; George Larson; F. Marcellino; M. Swanson; William Griswold; C. E. Olson; C. I. Hill; Emil Johnson; C. Peterson; Earl Whitford; F. A. Fetterly; Thomas S. Short.

HARTMAN & HARTMAN,

Attorneys for W. E. Morris.

WALTER S. FULTON,
Attorney for Crane & Co.
STILES & LATCHAM,
Attorneys for Ben Olson Co.
STILES & LATCHAM,
Attorneys for F. H. Godfrey.

NOTE: No one being in Mr. Walter M. Harvey's office, and the door being locked, I left him a copy by stuffing it thru his mail chute.

GORDON MIFFLIN.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 4, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [990]

Stipulation Re Consolidation of Transcript of Record.

IT IS HEREBY STIPULATED by and between all parties hereto, through their respective attorneys of record that

WHEREAS, the above-entitled action involves varying and diverse claims which were all heard together upon the trial of said cause, and a decree was entered therein on May 2, 1922, awarding separate judgments to various parties herein, and

WHEREAS, separate appeals from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit have been allowed to

(1) Scandinavian-American Bank of Tacoma, Claude P. Hay, Forbes P. Haskell, Jr.,

Deputy State Bank Commissioner, and John P. Duke, Supervisor of Banking of the State of Washington;

(2) Scandinavian-American Building Co., and Forbes P. Haskell, Jr., its Receiver;

(3) Tacoma Millwork & Supply Company;

(4) Washington Brick, Lime & Sewer Pipe Company, a corporation;

(5) Ben Olson Company, a corporation;

(6) McClintic Marshall Company, a corporation; E. E. Davis & Company, a corporation; and Far West Clay Company, a corporation; [991]

AND WHEREAS, the evidence upon said separate appeals has all been included in one statement of the testimony and so certified by the trial court; and

WHEREAS, each of said appellants has filed with the clerk of the said District Court a praecipe directing said clerk to prepare a transcript of the record, containing so much thereof as to said appellants seem material upon the hearing of his or its appeal; and

WHEREAS, each of said praecipes has been duly served upon all parties to said action; and

WHEREAS, said praecipes call for the duplication of many parts of the record herein, which duplication is unnecessary and will needlessly encumber said record,

NOW, THEREFORE, to facilitate the preparation of the returns to said appeals and to avoid duplication in the transcript of the record, and to

expedite the hearing of said appeals, it is hereby agreed that the clerk of said District Court shall certify and transmit one consolidated transcript of the record as his return to all of said appeals; that such consolidated transcript of the record shall be filed and shall constitute transcript of the record in each of said separate appeals and may be used by each of the parties as a separate transcript of the record on their respective appeals, which appeals, notwithstanding such consolidation of the record, shall be separately docketed and heard as separate appeals; but that only two copies of the printed transcript need be furnished to counsel of each of the parties.

IT IS FURTHER STIPULATED that said appeals shall be heard, one after the other, at the February, 1923, session of said United States Circuit Court of Appeals at San Francisco, [992] California.

IT IS FURTHER STIPULATED that said consolidated transcript of the record shall consist of the papers and documents set forth in Exhibit "A" attached hereto and made a part hereof, and no others, unless on or before November 6, 1923, any party to this action shall file with the clerk of said District Court a supplemental praecipe asking for other or additional matters of record, as contemplated and provided for in Equity Rule 75, in which event any question as to the inclusion of such additional papers or documents shall be determined in the manner provided by said rule.

Dated at Tacoma, Washington, this 31st day of October, 1922.

HAYDEN, LANGHORNE & METZ-
GER,
Attorneys for Complainant.
KELLY & MacMAHON,
F. D. OAKLEY,
Attorneys for Scandinavian-American Building Company & Forbes P. Haskell, its Rec.
FITCH & ARNTSON,
Attorneys for Savage-Scofield Company.
JAS. W. REYNOLDS,
PETERS & POWELL,
Attorneys for E. E. Davis & Co.
R. S. HOLT,
Attorney for Far West Clay Co.
W. W. KEYES,
Attorney for Hunt & Mottet.
CHAS. P. LUND,
DAVIS & NEAL,
Attorneys for Washington Brick, Lime & Sewer Pipe Co.
A. O. BURMEISTER,
Attorney for United States Machine & Engineering Co.
EDWIN H. FLICK,
Attorney for Tacoma Millwork Supply Co.
KELLY & MacMAHON,
F. D. OAKLEY,
Attorneys for Scandinavian-American Bank of Tacoma, Claude P. Hay, Forbes B. Haskell, Deputy State Bank Com., John P. Duke, Supervisor of Banks, et al.

BATES & PETERSON,
Attorneys for Puget Sound Iron & Steel Works.
HERBERT S. GRIGGS,
L. R. BONNEVILLE,
Attorneys for St. Paul & Tacoma Lumber Company.
W. W. KEYES,
Attorney for Henry Mohr Hdwe.
WALTER M. HARVEY,
Attorney for Edward Miller Cornice & Roofing Co.
BOGLE, MERRITT & BOGLE,
Attorney for Otis Elevator Co. [992½]
LYLE, HENDERSON & CARNAHAN,
Attorney for Tacoma Shipbuilding Company.
STILES & LATCHAM,
Attorney for Ben Olson Co. and F. H. Godfrey.
E. N. EISENHOWER,
Attorney for Ajax Electric Company.
TEATS, TEATS & TEATS,
Attorney for J. D. Mullins Bros.
LOUIS J. MUSCEK,
Attorney for Liberty Lumber & Fuel Company.
D. R. HOPPE,
Attorney for Atlas Paint Company.
TUCKER & HYLAND,
Attorney for O. S. Larson.
HARR, BAYLEY & CROSON,
Attorney for Seattle Hardware Company.
CHAS. BEDFORD,
Attorney for N. A. Hansen et al, included as defendants in cross-complaint.

S. F. McANALLY,
Attorney for Boedecker & Owens.
GROSSCUP & MORROW,
Attorney for Colby Star Manufacturing Company and P. & G. Lbr. Co.
H. A. P. MYERS,
Attorney for H. C. Greene Iron Works.
BURKEY, O'BRIEN & BURKEY,
Attorneys for City Lumber Agency.
WALTER S. FULTON,
Attorney for Crane Co.

——————————,
Attorney for West Coast Monumental Co.
L. R. BONNEVILLE,
DAVIS & NEAL,
Attorney for Davis & Neal.
D. R. HOPPE,
Attorney for Theodore Hedlund.
BAUSMAN, OLDHAM, BULLITT & EGGERMAN,
Attorney for Frederick Webber, G. Wallace Simpson.
DeWITT M. EVANS,
Attorney for F. R. Schoen.
HARTMAN & HARTMAN,
Attorneys for W. E. Morris.

NOTICE: Copy of within stipulation left with Mr. Lockerby, atty. for J. A. Soderburg & West Coast Monumental Co., who refused to sign the same, because his client has abandoned the action.

2. No one being in Mr. Walter M. Harvey's

office, and the door being locked, I left him a copy by stuffing thru his mail chute.

(Signed) GORDON MIFFLIN. [993]

EXHIBIT "A."

LIST OF PAPERS TO BE INCLUDED IN CONSOLIDATED TRANSCRIPT.

1. Original bill of complaint.
2. Motion to dismiss complaint filed February 7, 1921.
3. Order denying motion to dismiss complaint.
4. Order permitting complainant to file Amended complaint.
5. Amended bill of complaint.
6. Petition of Tacoma Millwork Supply Company for appointment of receiver.
7. Order of March 23, 1921, appointing F. P. Haskell, Jr., receiver of Scandinavian-American Building Co.
8. Order of May 21, 1921, making F. P. Haskell, Jr., as receiver, party defendant in this cause.
9. Order of June 14, 1921, granting leave to sue receiver, with consent thereto attached.
10. Order of June 27, 1921, granting leave to sue such receiver and to amend the Amended Complaint to include F. P. Haskell, Jr., as such receiver as party defendant.
11. Answer of Scandinavian-American Building Co. and F. P. Haskell, Jr., as receiver, to Amended Complaint.
12. Complainant's motion to strike part of such answer.

13. Order of June 27, 1921, granting motion to strike.
14. Reply of complainant to said answer.
15. Answer and cross-complaint of J. P. Duke and Scandinavian-American Bank of Tacoma.
16. Acknowledgment of service of said cross-complaint and appearance and waiver.
17. Motion to strike part of said cross-complaint.
18. Order of June 27, 1921, granting said motion.
19. Reply of complainant to said answer and cross-complaint.
20. Answer and cross-complaint of Tacoma Millwork Supply Co.
21. Complainant's reply thereto.
22. Amended and Supplemental answer and complaint of Tacoma Millwork Supply Company.
23. Complainant's reply thereto.
24. Answer of F. P. Haskell, Jr., as receiver to cross-complaint of Tacoma Millwork Supply Company. [994]
27. Answer and cross-complaint of Washington Brick, Lime & Sewer Pipe Co.
28. Answer of F. P. Haskell, Jr., as Receiver, to said cross-complaint.
29. Complainant's reply to said answer and cross-complaint.
30. Order allowing Ben Olson Co. to amend answer and cross-complaint.
31. Amended answer and cross-complaint of Ben Olson Co.

32. Complainant's reply to said cross-complaint.
33. Answer of F. P. Haskell, Jr., as Receiver, to answer and cross-complaint of Ben Olson Co.
34. Answer and cross-complaint of Far West Clay Co. to amended bill of complaint.
35. Answer and cross-complaint of E. E. Davis & Co. to amended bill of complaint.
36. Answer of Far West Clay Co. to answer and cross-complaint of Scandinavian-American Bank and J. P. Duke.
37. Stipulation adopting said Answer (No. 36) as answer of all other parties.
38. Order of October 19, 1921, approving and ratifying said stipulation.
39. Stipulation avoiding cross-complaints as between defendants.
40. Stipulation between attorneys for Tacoma Millwork Supply Co. on the one hand, and attorneys for McClintic-Marshall Co., E. E. Davis & Co. and Far West Clay Co., for use on appeal, of briefs filed in this court.
41. Court's memorandum opinion.
42. Exception of Tacoma Millwork Supply Co. to said memorandum opinion.
43. Decree.
44. Order correcting decree.
45. Exceptions of Tacoma Millwork Supply Co. to decree.
46. Petition of Forbes P. Haskell, Jr., as Receiver of Scandinavian-American Building Company, a corporation, for appeal. [995]

47. Order allowing above appeal and fixing bond.
48. Bond on said appeal.
49. Assignments of error on above appeal.
50. Citation issued on behalf of Forbes P. Haskell, Jr., hereinabove named and admission of service thereof.
51. Notice of lodgment of statement of evidence, and acknowledgment of service thereof.
52. Petition for appeal on behalf of Tacoma Millwork Supply Co.
53. Order allowing said appeal.
54. Bond on said appeal.
55. Assignments of error of Tacoma Millwork Supply Co.
56. Citation on appeal of Tacoma Millwork Supply Co.
57. Proof of service of said citation.
58. Notice of lodgment of statement of evidence proposed by Tacoma Millwork Supply Co. and proof of service thereof.
59. Petition for appeal by Washington Brick, Lime & Sewer Pipe Company, and order allowing same.
60. Assignments of error by Washington Brick, Lime & Sewer Pipe Company.
61. Bond on said appeal.
62. Citation on said appeal.
63. Notice of filing assignments of error and of lodgment of statement of evidence.
64. Proof of service by Washington Brick, Lime & Sewer Pipe Co. of citation and notice of

filing assignments of error and lodgment of statement of evidence.

65. Petition for appeal of Ben Olson Company and order allowing same and fixing bond.
66. Assignment of errors—Ben Olson Company.
67. Citation and admission of service thereof—Ben Olson Co.
68. Bond on appeal—Ben Olson Company.
69. Notice of lodgment of statement of evidence.
70. Petition of J. P. Duke, as Supervisor of Banks of the State of Washington, and as Successor in office to the defendants Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, [996] Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, for appeal.
71. Order allowing above appeal and fixing bond.
72. Bond on said appeal.
73. Assignments of error on above appeal.
74. Citation issued on behalf of J. P. Duke et al. hereinabove named, and admission of service thereof.
75. Notice of lodgment of statement of evidence and acknowledgment of service thereof.
76. Petition of McClintic-Marshall Company, et al., for appeal and order allowing appeal.
77. Bond on said appeal.
78. Assignment of errors on appeal of McClintic-Marshall Company, et al.

79. Notice of lodgment of statement of evidence on behalf of McClintic-Marshall Company et al.
80. Order to show cause as to statement of evidence on behalf of McClintic-Marshall Company, et al.
81. Stipulation relative to evidence on appeal of McClintic-Marshall Company, et al.
82. Order settling and certifying said evidence.
83. Citation on appeal of McClintic-Marshall Company, et al.
84. Acknowledgment of service of citation on appeal and order to show cause as to statement of evidence.
85. First order enlarging time of Tacoma Millwork Supply Company for preparing and filing of record.
86. Second order enlarging time of Tacoma Millwork Supply Company for filing of record to July 21, 1922.
87. Order of June 30, 1922, continuing cause over the term.
88. Order of August 30, 1922, extending the time for filing the record on appeal of F. P. Haskell, Jr., as Receiver.
89. Order of August 30, 1922, extending the time for filing the record on appeal of J. P. Duke.
91. Order of September 6, 1922, extending time for filing record to October 16, 1922.

92. Order fixing time for settling statement of evidence with proof of service thereof. [997]
93. Statement of evidence.
94. Order of October 9, 1922, settling and certifying said statement of evidence.
95. Petition to extend time for filing record, filed October 13, 1922.
96. Order extending time for the filing of record, entered October 13, 1922.
97. Praecipe for transcript of record on behalf of F. P. Haskell, Jr., as receiver.
98. Praecipe for transcript of record on behalf of Tacoma Millwork Supply Company.
99. Praecipe for transcript of record on behalf of Washington Brick, Lime & Sewer Pipe Company.
100. Praecipe for transcript of record on behalf of Ben Olson Co.
101. Praecipe for transcript of record on behalf of J. P. Duke.
102. Praecipe for transcript of record on behalf of McClintic-Marshall Co. et al.
103. Stipulation for omission of captions and verifications, etc., from printed record.
104. Proof of service of praecipes of the several appellants.
105. Stipulation for consolidated transcript of record.
106. Order directing transmission of certain original exhibits to the Circuit Court of Appeals.

108. Clerk's certificate to transcript of record.
109. Petition for extension of time for 30 days from Nov. 15, 1922.
110. Order extending time for filing record for 30 days from Nov. 15, 1922.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov 4, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [998]

Order Re Transmission of Original Exhibits.

Upon application of counsel for the several parties, appealing from the decree of this court, entered May 2, 1922, it appearing to the Court that an inspection of the original exhibits on file in this cause is desirable, and in many instances necessary for the proper determination of said appeals, the court being otherwise duly advised in the premises,—

DOTH HEREBY ORDER that all of the original exhibits referred to by number in the list or schedule hereto appended be forwarded by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, PROVIDED, HOWEVER, that this order and the list of exhibits hereto annexed shall not operate to prevent the application by any of the appellants for an order directing the transmittal of other original exhibits should such course hereafter be found necessary or desirable.

Done in open court this 9th day of December, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [999]

LIST OF ORIGINAL EXHIBITS TO BE TRANSMITTED TO THE CIRCUIT COURT OF APPEALS.

1. Defendants' Exhibit No. 7 attached to deposition of G. L. Taylor, being letter dated June 16, 1920, from O. S. Larson.
2. Defendants' Exhibit No. 12 attached to deposition of G. L. Taylor, being letter dated July 20, 1920, from O. S. Larson.
3. Exhibit No. 104 (Receiver) being letter Mc-M. Co. to Larson, dated June 24, 1920.
4. Exhibit No. 117 (Receiver) being letter from Webber to Mc-M. Co. dated May 1, 1920.
5. Exhibit No. 118 (Receiver), being letter from Webber to Mc-M. Co. dated May 7, 1920.
6. Exhibit No. 122 (Receiver), being letter from Webber to Mc-M. Co. dated June 12, 1920.
7. Exhibit No. 125 (Receiver), being bill of extra work by E. E. Davis & Co.
8. Exhibit No. 151 (Flick), being contract Tacoma Millwork Sup. Co.
9. Exhibit No. 152 (Flick), being contract Tacoma Millwork Sup. Co.

10. Exhibit No. 153 (Flick), being contract Tacoma Millwork Sup. Co.
11. Exhibit No. 154 (Flick), being computation of value of work done.
12. Exhibits 155 to 166 (Flick), being photographs of material.
13. Exhibit No. 167 (Flick), being letter from Tacoma Millwork Sup. Co. to Scand.-Am. Bldg. Co. dated December 27, 1920, and reply thereto dated December 30, 1920.
14. Exhibit No. 168 (Flick), being letter Tacoma Millwork Sup. Co. to F. P. Haskell, Jr., dated March 8, 1921, and reply thereto of same date.
15. Exhibit No. 169 (Receiver), being specifications and blue-prints.
16. Exhibit No. 170 (Receiver), being invoice of Millwork Co. dated July 30, 1920.
17. Exhibit No. 171 (Receiver), being invoice of Millwork Co. dated August 23, 1920.
18. Exhibit No. 172 (Flick), being lien of Millwork Co.
19. Exhibit No. 173 (Flick), being lien of Millwork Co.
20. Exhibit No. 174 (Flick), being lien of Millwork Co. [1000]
21. Exhibit No. 175 (Receiver), being letter from Millwork Co. to Frederick Webber, dated Aug. 3, 1920.
22. Exhibit No. 176 (Flick), being estimate of Millwork Co., dated January 6, 1921.

23. Complainant's Exhibit "F" attached to the deposition of G. L. Taylor.
24. Exhibit 136 (Lund), being contract of Wash. Brick, L. & S. P. Co.
25. Exhibit 191 (Flick), being letter of Far West Clay Co. to Webber, dated Feb. 23, 1920.
26. Exhibit 192 (Flick), being letter from Lund to Webber, dated Feb. 25, 1920, enclosing proposal of Wn. B., L. & S. P. Co.
27. Exhibit No. 130 (Lund), being a blue-print.
28. Exhibits No. 131–133 (Lund), being photographs of terra cotta.
29. Exhibit No. 134 (Receiver), being letter from Wells to Wash. Brick, Lime & S. P. Co., dated Nov. 2, 1920.
30. Exhibit No. 135 (Receiver), being letter from Wells to Wash. B., L. & S. P. Co., dated November 4, 1920.
32. Exhibit No. 137 (Lund), being lien notice of Wn. B., L. & S. P. Co.
33. Exhibit No. 138 (Lund), being letter Webber to Wn. B., L. & S. P. Co., dated June 5, 1920.
34. Exhibit No. 139 (Receiver), being letter Wash. B., L. & S. P. Co. to Webber, dated Feb. 19, 1920.
35. Exhibit No. 140 (Receiver), being letter from Wash. B., L. & S. P. Co. to S. A. Bldg. Co., dated Feb. 5, 1920.
36. Exhibit No. 141 (Receiver), being estimate of material.

37. Exhibit No. 142 (Receiver), being letter from Guy E. Kelly to Wash. B., L. & S. P. Co., dated August 6, 1921.
38. Exhibit No. 143 (Lund), being statement of Aug. 11, 1921.
39. Exhibit No. 144 (Lund), being checking sheets.
40. Exhibit No. 145 (Lund), being memorandum-book.
41. Exhibit No. 146 (Lund), being list of cracked terra cotta.
42. Exhibit 147 (Lund), being list of broken terra cotta.
43. Exhibit No. 148 (Lund), being legend for blue-print exh. 130.
44. Exhibit No. 149 (Lund), being letter Haskell to Fosseen, dated 3–12–1921. [1001]
45. Exhibit No. 150 (Lund), being letter Fosseen to Haskell, dated March 15, 1921.
46. Exhibit 251 (Stiles), being bid of Ben Olson Co., dated February 25, 1920.
47. Exhibit 252 (Stiles), being Ben Olson Co. contract.
48. Exhibit No. 253 (Stiles), being Ben Olson Co. Estimate No. 1.
49. Exhibit No. 254 (Stiles), being Bldg. Co.'s check 346 to Ben Olson Co.
50. Exhibit No. 255 (Stiles), being Ben Olson Co. estimate No. 2.
51. Exhibit No. 256 (Stiles), being Bldg. Co.'s check No. 530 to Ben Olson Co.

52. Exhibit No. 257 (Stiles), being Ben Olson Co. estimate No. 3.
53. Exhibit No. 258 (Stiles), being Ben Olson Co. estimate No. 4.
54. Exhibit No. 259 (Stiles), being order permitting withdrawal of certain materials.
55. Exhibit No. 260 (Stiles), being copy Ben Olson Co. lien notice.
56. Exhibit No. 261 (Stiles), being Ben Olson Co. proof of claim against S. A. Bank and reply of Haskell thereto.
57. Exhibit No. 262 (Stiles), being Ben Olson Co. estimate No. 5.
58. Exhibit No. 263 (Stiles), being Ben Olson Co. estimate No. 6.
59. Exhibit No. 264 (Receiver), being Crane Co.'s catalog.
60. Exhibit No. 265 (Receiver), being Ben Olson Co.'s petition to withdraw materials.
61. Exhibit No. 266 (Langhorne), being specifications Ben Olson Co.'s contract.
62. Exhibit 269 (Stiles), being recapitulation Ben Olson Co. claim.
63. Exhibit No. 270 (Langthorne), being order sheet Ben Olson Co.
64. Exhibit No. 183 (Flick), being minute-book S. A. Bank.
66. Defendants' Exhibit No. 8, attached to deposition to G. L. Taylor.
67. Defendants' Exhibit No. 9, attached to deposition of G. L. Taylor.

68. Defendants' Exhibit No. 10, attached to deposition of G. L. Taylor.
69. Defendants' Exhibit No. 11, attached to deposition of G. L. Taylor. [1002]
72. Exhibit No. 272 (Fulton), being lien notice of Crane Co.
73. Exhibit No. 273 (Receiver), being order of Ben Olson Co. to Crane Co., dated Feb. 27, 1920.
74. Exhibit No. 274 (Receiver), being order No. 27 Ben Olson Co. to Crane Co.
75. Exhibit No. 275 (Receiver), being order Ben Olson Co. to Crane Co., dated Feb. 26, 1920.
76. Exhibit No. 276 (Stiles), being letter Pacific San. Mfg. Co. to Crane Co.
77. Exhibit No. 357 (Stiles), being estimate of Ben Olson Co., dated April 4, 1922.
78. Exhibit No. 177 (Flick), being letter Metropolitan Life to S. A. Bldg. Co., dated November 7, 1919.
79. Exhibit No. 178 (Flick) being minute-book S. A. Bldg. Co.
80. Exhibit No. 179 (Flick), being copy Articles of Incorporation of S. A. Bldg. Co.
81. Exhibit No. 180 (Receiver), being mortgage Bldg. Co. to Simpson.
82. Exhibit No. 334 (Receiver), being said mortgage with assignment to S. A. Bank attached.
83. Exhibit No. 182 (Receiver), being declaration of trust by Simpson.

84. Exhibit No. 184 (Receiver), being certificate and agreement of S. A. Bank.
85. Exhibit No. 185 (Flick), being collateral card of S. A. Bank.
86. Exhibit No. 187 (Flick), being ledger card of S. A. Bank.
87. Exhibit No. 188 (Flick), being six ledger cards of S. A. Bank.
88. Exhibit No. 190 (Flick), being debit memo of S. A. Bank and deposit slip attached.
89. Exhibit No. 193 (Flick), being letter of Metropolitan Life Insurance Co. to O. S. Larson, dated Sept. 19, 1919.
90. Exhibit No. 194 (Flick), being telegram from Stabler to S. A. Bank.
91. Exhibit No. 195 (Stiles), being five stock certificates of S. A. Bldg. Co.
92. Exhibit No. 199 (Receiver), being letter of Larson to Simpson, dated August 29, 1919, and telegram Simpson to Larson, dated August 24, 1919. [1003]
93. Exhibit No. 202 (Receiver), being letter Chilberg to Larson, dated Aug. 6, 1919.
94. Exhibit No. 203 (Receiver), being letter Larson to Chilberg, dated August 16, 1919.
95. Exhibit No. 204 (Receiver), being letter Larson to Chilberg, dated August 20, 1919, and reply, dated Aug. 19, 1919.
96. Exhibit No. 205 (Receiver), being telegram Stabler to Larson, dated October 15, 1919.
97. Exhibit No. 206 (Receiver), being letter Baus-

man, Oldham to Bldg. Co., dated Nov. 12, 1919.

98. Exhibit No. 207 (Receiver), being letter Larson to Oldham, dated November 13, 1919.
99. Exhibit No. 208 (Receiver), being telegram Simpson to Larson, dated October 25, 1919.
100. Exhibit No. 209 (Receiver), being letter and telegram Larson to Stabler, dated October 18th and October 16th, 1919, et al.
101. Exhibit No. 210 (Receiver), being letter Waid to Larson, dated July 2, 1920, and reply dated July 7, 1920.
102. Exhibit No. 211 (Receiver), being letter Waid to Larson, dated July 28, 1920.
103. Exhibit No. 212 (Receiver), being letters between Waid and Larson, dated November 3d and November 10th, 1920.
104. Exhibit No. 213 (Receiver), being telegram Larson to Simpson, dated June 22, 1920, and telegram Simpson to Larson, dated June 17, 1920.
105. Exhibit No. 214 (Receiver), being telegram Larson to Simpson, dated December 31, 1920.
106. Exhibits Nos. 215 to 218 (Receiver), being telegrams Larson to Simpson, from Dec 16, 1920.
107. Exhibit No. 219 (Receiver), being letter Hay to Larson, dated June 21, 1920.
108. Exhibit No. 220 (Receiver), being letter Hay to Larson, dated Aug. 23, 1920.

109. Exhibit No. 221 (Receiver), being letter Hay to Larson, dated November 12, 1920.
110. Exhibit No. 222 (Receiver), being telegram Simpson to Williamson, dated December 30, 1919.
111. Exhibit No. 223 (Receiver), being note of Bldg. Co. for $600,000.
112. Exhibit No. 224 (Receiver), being telegram and confirmation Larson to Oldham, dated March 11th and April 15th, 1920. [1004]
113. Exhibit No. 225 (Receiver), being notice from Bank Commissioner, dated Jan. 5, 1920.
114. Exhibit No. 226 (Receiver), being statement of S. A. Bank, dated May 4, 1920.
115. Exhibit No. 227 (Receiver), being statement S. A. Bank, dated Feb. 28, 1920.
116. Exhibit No. 228 (Flick), being telegram Larson to Simpson, dated June 1, 1920.
117. Exhibit No. 229 (Flick), being telegram Larson to Simpson, dated November 20, 1920.
118. Exhibit No. 230 (Receiver), being power of attorney to Simpson, dated Aug. 17, 1920.
119. Exhibit No. 234 (Flick), being ledger sheet for bank account No. 13.
120. Exhibit No. 235 (Flick), being memorandum voucher, dated December 31, 1920.
121. Exhibit No. 242 (Receiver), being mortgages S. A. Bank to Penn Mutual for $100,000.
122. Exhibit No. 243 (Receiver), being note of S. A. Bank to Penn Mutual for $100,000.
123. Exhibit No. 244 (Receiver), being affidavit of good faith by Chilberg and wife.

124. Exhibit No. 245 (Receiver), being agreement for extension of $100,000 mortgage.
125. Exhibit No. 248 (Receiver), memos Larson to Sheldon, dated June 28 and Sept. 24, 1920.
126. Exhibit No. 249 (Receiver), being note of Bldg. Co. to S. A. Bank and memo thereto attached, dated October 7, 1920.
127. Exhibit No. 250 (Flick), being certificate of stock of Bldg. Co.
128. Exhibit No. 322 (Receiver), being deed S. A. Bank to Chilberg.
129. Exhibit No. 323 (Receiver), being deed from Chilberg and wife to S. A. Bank.
130. Exhibit No. 324 (Receiver), being affidavit of good faith by Chilberg and wife.
131. Exhibit No. 325 (Receiver), being deed from S. A. Bank to S. A. Bldg. Co.
132. Exhibit No. 326 (Receiver), being mortgage from Chilberg and wife to Penn Mutual. [1005]
133. Exhibit No. 327 (Receiver), being agreement for extension of Penn Mutual note and mortgage.
134. Exhibit No. 328 (Receiver), being assignment mortgage from Penn Mutual to Haskell.
135. Exhibit No. 329 (Receiver), being assignment mortgage from Haskell to Duke.
136. Exhibit No. 330 (Receiver), being appointment Haskell as Deputy Bank Commissioner.

137. Exhibit No. 331 (Receiver), being appoint-ment Haskell as Special Deputy Supervisor of Banking.
138. Exhibit No. 332 (Receiver), being deed from Drury and wife to S. A. Bldg. Co.
139. Exhibit No. 335 (Receiver), being order of Superior Court to take up Penn Mutual mortgage.
140. Exhibit No. 336 (Receiver), being filing jacket of S. A. Bank.
141. Exhibit No. 338 (Receiver), being check No. 157 of Haskell as Special Deputy Bank Commissioner.
142. Exhibit No. 340 (Receiver), being telegram from Lindeberg to Larson, dated November 11, 1919.
143. Exhibit No. 341 (Receiver), being check to Penn Mutual for $70,000 and letter from Larson to Sheldon relating to same.
144. Exhibit No. 342 (Receiver), being memorandum from Larson to Sheldon, dated Sept. 23, 1920.
145. Exhibit No. 343 (Receiver), being telegram from Larson to Sheldon, dated Sept. 30, 1920.
146. Exhibit No. 344 (Receiver), being telegram from Jack to Sheldon, dated October 1, 1920.
147. Exhibit No. 345 (Receiver), being telegram Larson to Sheldon, dated October 1, 1920.
148. Exhibit No. 346 (Receiver), being telegram Jack to Sheldon, dated October 7, 1920.

149. Exhibit No. 347 (Receiver), being telegram Larson to Sheldon, dated October 5, 1920.
150. Exhibit No. 348 (Receiver), being statement of indebtedness S. A. Bldg. Co. to S. A. Bank.
151. Exhibit No. 349 (Receiver), being published statement of condition of S. A. Bank as of November 15, 1920. [1006]
152. Exhibit No. 350 (Receiver), being statement of interest charges to S. A. Bldg. Co.
153. Exhibit No. 351 (Flick), being original ledger sheet of S. A. Bank for S. A. Bldg. Co. account.
154. Exhibit No. 352 (Flick), being original ledger sheet of S. A. Bank covering banking-house account.
155. Exhibit No. 353 (Flick), being ledger sheet of S. A. Bank covering general real estate account.
156. *Exhi* [1007]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from one to 1014, inclusive, constitute a full, true and correct transcript of the record and proceedings in the con-

solidated appeal in the matter of the appeals in the case of McClintic-Marshall Company, a corporation, complainant against Scandinavian-American Building Co., a corporation, Scandinavian-American *American* Bank, a corporation, and Ann Davis and R. T. Davis, as executors of the estate of R. T. Davis, deceased, et al., as Tacoma Millwork Supply Company et al., defendants, lately pending in this court, as set forth by the praecipes of counsel for each appellant in the several appeals herein consolidated and filed in said cause, as the originals appear on file in this court at the City of Tacoma, Washington, in the District aforesaid.

I further certify and return that I hereto attach and herewith transmit the original citation of each appellant herein.

I further certify that I have on October 14th, 1922, and on November 10th, 1922, forwarded to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the original orders extending time for transcript, copies of which orders are included in the transcript.

I further certify that I am transmitting all of the exhibits referred to attached to the order requiring them to be transmitted to the Circuit Court of Appeals for the Ninth [1008] Circuit.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred on behalf of the several appellants herein as hereinafter set forth, for making the record, certificate and return to the United States

Circuit Court of Appeals for the Ninth Circuit in said above-entitled cause, as follows, to wit:

Clerk's Fees (Sec. 828, R. S. U. S.) for making record, certificate and return of Forbes P. Haskell, as Receiver of Scandinavian-American Building Co., etc., Appellant No. 1, 391 fols. @ 15¢ ea.	$ 58.65
Clerk's Fees (Sec. 828, R. S. U. S.) for making record certificate and return of Tacoma Millwork Supply Co., Appellant No. 2,618 fols. @ 15¢ ea.	92.70
Clerk's Fees (Sec. 828, R. S. U. S.) for making record, certificate and return of McClintic-Marshall Co. et al., Appellants No. 3, 117 fols. @ 15¢ ea.	17.55
Clerk's Fees (Sec. 828, R. S. U. S.) for making record, certificate and return of Washington Brick, Lime & Sewer Pipe Company, Appellant No. 4, 357 fols. @ 15¢	53.55
Clerk's Fees (Sec. 828, R. S. U. S.) for making record, certificate and return of Ben Olson Co. Appellant No. 5, 432 fols. @ 15¢ ea.	64.80
Clerk's Fees, (Sec. 828, R. S. U. S.) for making record, certificate and return of John P. Duke as Supervisor of Banks of the State of Washington, etc., et al., Appellant No. 6, 1029 fols. @ 15¢ ea. ..	154.35
Certificate to Transcript, 6 folios @ 15¢ ea.	.90
Seal of said certificate	.20

ATTEST my official signature and the seal of the said Court at Tacoma, in said District, this 11th day of December, A. D. 1922.

[Seal] F. M. HARSHBERGER,
Clerk.
By Alice Huggins,
Deputy Clerk. [1009]

Petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company, Washington Brick, Lime & Sewer Pipe Company, McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company for Order Extending Time to File Record on Appeal.

The petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company, Washington Brick, Lime & Sewer Pipe Company, McClintic-Marshall Company, E. E. Davis & Company, and Far West Clay Company respectfully shows that on the 3d day of May, 1922, a decree, denying to the petitioners herein the relief prayed for in their respective answers and cross-complaints, was entered by this court in the above-entitled action, and your petitioners further show that appeals to the Circuit Court of Ap-

peals of the United States for the Ninth Circuit have been heretofore allowed by your Honor, and that citations have been issued by your Honor for all of the undersigned petitioners. And that subsequently your Honor extended said return days upon all of said citations to the 15th day of November, 1922.

That your Honor, pursuant to orders extending time [1010] theretofore entered, settled and approved the statement of evidence on the 9th day of October, 1922.

Your petitioners further show that because of the great number of pleadings and exhibits which are in the record of the trial of the cause before your Honor, and because of the largeness of said record, your petitioners will not be able to file the same in the Circuit Court of Appeals as aforesaid by the 15th day of November, 1922.

The premises considered, your petitioners pray that they be granted an enlargement of time in which to file the record in said Circuit Court of Appeals for the Ninth Circuit, and that they be allowed thirty days from the 15th day of November, 1922, in addition to the time allowed by law, and as in duty bound your petitioners will ever pray, etc.

F. D. OAKLEY,
KELLY & MacMAHON,
Solicitors for James P. Duke, Supervisor of Banking of the State of Washington.

F. D. OAKLEY,
KELLY & MacMAHON,
Solicitors for Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company.

ERWIN H. FLICK,
Solicitor for Tacoma Millwork Company.
STILES & LATCHAM,
Solicitor for Ben Olson Company.
CHARLES P. LUND,
DAVIS & NEAL,
Solicitors for the Washington Brick, Lime & Sewer Pipe Company.
HAYDEN, LANGHORNE & METZGER,
Solicitors for McClintic-Marshall Company.
[1011]
JAS. W. REYNOLDS,
PETERS & POWELL,
Solicitors for E. E. Davis & Company.
H. S. HOLT,
Solicitor for Far West Clay Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. November 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [1012]

Order Allowing Petition for Extending Time.

This cause came on to be heard on the petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company and the Washington Brick, Lime & Sewer Pipe Company, McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company, defendants

and cross-complainants and appellants in the above-entitled cause, praying for an enlargement of time in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

And it appearing to the court that, by reason of the great volume of pleadings and exhibits and of the record, the said appellants will not have time to file the same in the Circuit Court of Appeals of the United States for the Ninth Circuit by the 15th day of November, 1922, which is the time required by law, as extended by order of this Court,—

IT IS THEREFORE HEREBY ORDERED, ADJUDGED and DECREED that the said appellants be and they are hereby allowed, in addition to the time allowed by law, as heretofore extended by this Court, thirty days from the 15th day of November, 1922, [1013] in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Done in open court this 10th day of November, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. By F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [1014]

[Endorsed]: No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, a Corporation, et al., Appellants, vs. McClintic-Marshall Company, a Corporation, et al., Appellees. Tacoma Millwork Supply Company, a Partnership Consisting of Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, Appellants, vs. McClintic-Marshall Company, a Corporation, et al., Appellees. McClintic-Marshall Company, a Corporation, and E. E. Davis & Company, a Corporation, and Far West Clay Company, a Corporation, Appellants vs. Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, et al., Appellees. Washington Brick, Lime & Sewer Company, a Corporation, Appellant, vs. McClintic-Marshall Company, a Corporation, et al., Appellees. Ben Olson Company, a Corporation, Appellant, vs. McClintic-Marshall Company, a Corporation et al., Appellees. J. P. Duke, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a Corporation, Appellants, vs. McClintic-Marshall Company, a Corporation, et al., Appellees. Transcript of Record.

Upon Appeals from the United States District Court for the Western District of Washington, Southern Division.

Filed December 14, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL COMPANY, a Corporation,

Complainant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Defendants.

Order Extending Time to and Including July 10, 1922, to File Record and Docket Cause (Washington Brick, Lime & Sewer Pipe Company).

This matter coming on for hearing, upon the application of the Washington Brick, Lime & Sewer Pipe Company, for additional time within which to prepare and file their record on appeal in this cause,—

IT IS HEREBY ORDERED that the Washington Brick, Lime & Sewer Pipe Company may have until the 10th day of July, 1922, within which to prepare and file in this court their record on appeal herein.

Done at Tacoma, Washington, this 29th day of June, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 29, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 10, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 14, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL COMPANY, a Corporation,

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Defendants.

Order Extending Time to and Including September 28, 1922, to File Record and Docket Cause (Forbes P. Haskell, Jr.).

For satisfactory reasons appearing to the Court, the time for filing record on behalf of Forbes P. Haskell, as Receiver of Scandinavian Building Company, a corporation, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is hereby extended to and including the 28th day of September, 1922.

Dated August 30th, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 117—E. In the United States Court, Western District of Washington. McClintic-Marshall Company, a Corporation, Complainant, vs. Scandinavian-American Building Company, a Corporation, et al., Defendants. Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and including Sept. 28, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 14, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL COMPANY, a Corporation,

Complainant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Defendants.

Order Extending Time to and Including September 28, 1922, to File Record and Docket Cause (J. P. Duke).

For satisfactory reasons appearing to the Court, the time for filing record on behalf of J. P. Duke, as Supervisor of Banks of the State of Washington, and as Successor in office to the defendants Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a Corporation, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is hereby extended to and including the 28th day of September, 1922.

Dated August 30th, 1922.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: No. 117—E. In the United States Court, Western District of Washington. McClintic-Marshall Company, a Corporation, Complainant, vs. Scandinavian-American Building Company, a Corporation, et al., Defendants. Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including September 28, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 14, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL COMPANY, a Corporation,

Complainant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Defendants.

Order Extending Time to and Including October 16, 1922 to File Record and Docket Cause (Ben Olsen Company et al.).

This matter coming on for hearing on this 6th day of September, 1922, on the application of Ben Olsen Company, a corporation, the Tacoma Millwork & Supply Company, a corporation, the Washington Brick, Lime & Sewer Pipe Company, a corporation, Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, and J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendants Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, appellants herein, for an order extēnding the time for the preparation and filing of the transcripts and records on appeal, pursuant to the appeals sued out herein by the various appellants, to Monday, October 16, 1922, for the reason that the Court has been unable to sooner settle the various statements of evidence, and is about to be absent from the state, and for other satisfactory reasons, now therefore,—

IT IS HEREBY ORDERED, that the time for for the preparation and filing of the transcripts and records on appeal on behalf of the various appellants named herein, in the Circuit Court of Appeals of the Ninth Circuit of the United States, be en-

larged and extended to and including the 16th day of October, 1922.

Done in open court this 6th day of September, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sep. 6, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including October 18, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 14, 1922. F. D. Monckton, Clerk.

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL COMPANY, a Corporation,

Complainant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Defendants.

Order Extending Time to and Including November 16, 1922, to File Record and Docket Cause (James P. Duke et al.).

This cause came on to be heard on the petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company and the Washington Brick, Lime & Sewer Pipe Company, defendants and cross-complainants and appellants in the above-entitled cause, praying for an enlargement of time in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

And it appearing to the Court that, by reason of the great volume of pleadings and exhibits and of the record, the said appellants will not have time to file the same in the Circuit Court of Appeals of the United States for the Ninth Circuit by the 16th day of October, 1922, which is the time required by law, as extended by order of this Court,—

IT IS THEREFORE HEREBY ORDERED, ADJUDGED and DECREED that the said appellants be and they are hereby allowed, in addition to the time allowed by law, as heretofore extended by this Court, thirty days from the 16th day of October, 1922, in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Done in open court this 13th day of October, 1922.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 13, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including November 16, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 14, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 117—E.

McCLINTIC-MARSHALL COMPANY, a Corporation,

Complainant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Defendants.

Order Extending Time to and Including December 15, 1922, to File Record and Docket Cause (James P. Duke et al.).

This cause came on to be heard on the petition of James P. Duke, Supervisor of Banking of the State of Washington, Forbes P. Haskell, as Receiver of

the Scandinavian-American Building Company, Tacoma Millwork Company, Ben Olson Company and the Washington Brick, Lime & Sewer Pipe Company, McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company, defendants and cross-complainants and appellants in the above-entitled cause, praying for an enlargement of time in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

And it appearing to the Court that, by reason of the great volume of pleadings and exhibits and of the record, the said appellants will not have time to file the same in the Circuit Court of Appeals of the United States for the Ninth Circuit by the 15th day of November, 1922, which is the time required by law, as extended by order of this Court,—

IT IS THEREFORE HEREBY ORDERED, ADJUDGED and DECREED that the said appellants be and they are hereby allowed, in addition to the time allowed by law, as heretofore extended by this Court, thirty days from the 15th day of November, 1922, in which to file the record in this cause in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Done in open court this 10th day of November, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3953. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 15, 1922, to File Record and Docket cause. Filed Nov. 13, 1922. F. D. Monckton, Clerk. Refiled Dec. 14, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, JR., as special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

No. 3953

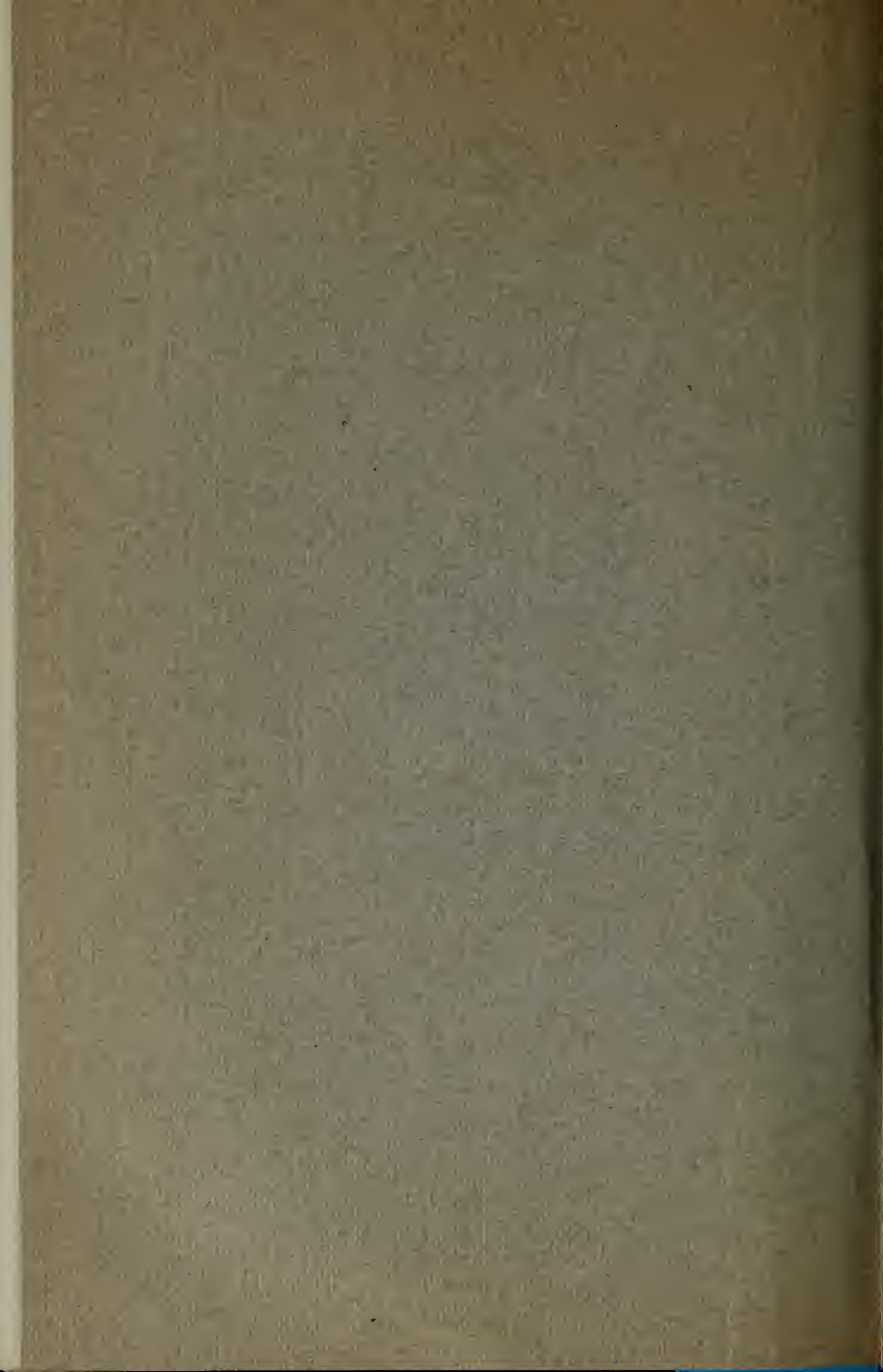
Brief of Appellants

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

F. D. OAKLEY,
GUY E. KELLY,
THOMAS MACMAHON,
Attorneys for Appellants.

408 Perkins Building,
Tacoma, Washington.

FILED



United States Circuit Court of Appeals

For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, JR., as special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees,

No. 3953

Brief of Appellants

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

STATEMENT OF THE CASE.

This controversy arises between lien claimants claiming priority for their liens upon certain real property situated in the City of Tacoma on the one hand and the Supervisor of Banking of the State of

Washington, an official of the State of Washington appointed by the Governor as liquidator of the defunct Scandinavian American Bank of Tacoma on the other. The particular questions involved are

First: Whether or not two mortgages held by the Supervisor are valid.

Second: Whether or not these mortgages are superior to the liens.

The facts with reference to these two mortgages are entirely different and are therefore separately stated.

THE $70,000.00 MORTGAGE—FIRST MORTGAGE.

The Scandinavian American Bank of Tacoma failed and was taken over for liquidation by the State of Washington on January 15, 1921.

This mortgage was not among the assets of the defunct bank when it failed, but was at that time owned by the Penn Mutual Life Insurance Company, the mortgagee therein named, which company was not made a party in the original complaint filed herein. It was, however, purchased by the Supervisor of Banking of the State of Washington after the institution of this action.

This defunct bank was incorporated prior to 1910. It was desirous of purchasing the six-story office building located on the corner of South 11th Street and Pacific Avenue, in the City of Tacoma, upon two lots designated as lots 11 and 12 in block 1003,

"Map of New Tacoma". The bank did not want to invest more money in this building than necessary and did not want to carry any liability upon its books of account for the balance of the purchase price remaining unpaid (Tr. p. 1134), so the property was deeded to J. E. Chilberg, its president (Ex. 322, Tr. p. 1188), on September 1, 1910; on September 2, 1910, Chilberg and his wife gave the Penn Mutual their note for $100,000.00 (Ex. 234, p. 1143), secured by the mortgage in question covering this property (Ex. 326, p. 1195 *et seq.*), accompanied by an affidavit of good faith, as required in the case of Chattel Mortgages in Washington, since the mortgage covered the fixtures and other personal property (Ex. 324, Tr. p. 1192), and on January 12, 1911, Chilberg and his wife reconveyed the property to the bank subject to this mortgage and another mortgage immaterial in this action, but the *bank did not assume the mortgage or agree to pay it.* (Ex. 323, Tr. p. 1190). This mortgage by its terms was payable on September 1, 1915, and at that time the Penn Mutual, the Chilbergs and the bank entered into an agreement, which was placed of record in Pierce County, whereby the mortgage was extended so that $30,000.00 was payable on or before September, 1919, and the balance—$70,000.00—became payable September 1, 1920; this agreement contains the following clause (Ex. 327, Tr. p. 1204 and pp. 1208-9):

"It being understood, however, that said Scandinavian American Bank of Tacoma does not itself assume any personal obligation to pay the indebtedness secured by said mortgage, the only personal obligation to pay said indebtedness secured by said mortgage being the personal obligation of J. E. Chilberg and Anna Chilberg, his wife."

This mortgage and agreement were duly placed of record and remained of record unaffected by any other instrument until after the failure of the bank and the institution of this action.

In the year 1919, O. S. Larson, the active head of this bank, decided that the six-story building was old and dilapidated and no longer a fitting habitation for his prosperous bank (Tr. p. 1040) and that a sixteen-story building was desirable. He got in touch with a bond broker, G. Wallace Simpson, who arranged with Strauss & Co. for a loan of $900,000 with which to build this building. He also got in touch with an architect, Frederick Webber, of Philadelphia. The directors of the bank were not a unit on the proposition—at that time Larson wrote Simpson as follows (Ex. 199, p. 1052-1054):

"As stated in this telegram three of our board of directors are offering very serious objection to the large loan of $900,000.00 unless the equity which the bank would own in the property could be sold outright *to the building corporation*, so that finally the only interest the bank would have in the property would be a lease on the banking room and

basement for, say, a period of twenty-five years, at an increased rental every five years, if desired."

The words which we have italicised show that it was even then the intention to form a corporation for the purpose of building, owning and operating this proposed building, and that it was further the intention that the bank, as such, should not only not invest its money in this project, but should actually receive all or nearly all it had put into the property.

At that time, too, Mr. Moore, then the Bank Commissioner of the State, was evidently objecting to the project, since Chilberg wrote to Larson under date of August 6, 1919, as follows (Ex. 202, p. 1058):

"I have been thinking over your conversation with Moore last night. I do not think I would worry that fellow any more anyway. His head is certainly thicker than mush.

"If you get your building financed and need the extra $150,000, put it on a second mortgage; give us (The Scandinavian American Bank of Seattle) one-half or two-thirds of it here and you carry the balance, and there is no one in the United States to kick unless it would be your stockholders or ours, and it is for their interests that we would be doing it."

To which Larson replied, under date of August 16 (Ex. 203, pp. 1059-60), outlining his schame for financing the building, in which he states that the bank was to be paid $350,000.00 for its old building; the "Drury lot", namely, the adjoining lot, was

to be purchased for $60,000.00 and the new building erected at a cost of $790,000.00, making a total outlay of $1,200,000.00, which was to be raised by a first mortgage to net $712,500.00, leaving $487,-500.00 to be raised on a second mortgage and in capital stock. This letter contains this clause:

"I have instructed our attorneys to incorporate immediately a corporation to be known as the 11th Street Improvement Company or some other suitable name. This corporation will purchase the property from the bank and Drury, construct the building and operate it."

On August 24th, Simpson wired the terms of the proposed Strause Loan, which would net the building corporation $810,000, and it was in the conference over this wire that the board of directors of the bank insisted that the bank, as such, get its equity in cash for the property to be conveyed to the building corporation (Ex. 199, p. 1052, *et seq.*)

In accordance with the suggestions contained in this letter, George G. Williamson, the bank's attorney and one of its directors, Mr. Thompson, another director, and Larson met in September in New York City with Simpson and Webber and it was decided to refuse the Strauss loan, and Larson then opened negotiations with the Metropolitan Life Insurance Company in New York City for a loan (Tr. 1041) and received a letter from that company by which it tentatively agreed to loan $650,000.00 on the building when it was completed. (Ex. 193, p. 1037

et seq.). This was followed by another letter, dated November 7, 1919, which is referred to as the "Metropolitan Commitment", wherein it was definitely stated that if the building was completed in accordance with plans then furnished by Webber the company would loan $600,000.00 on it when completed. (Ex. 177, Tr. p. 981 *et seq.*).

The court will notice that this last letter was addressed to "Scandinavian American Building Company".

Notwithstanding all this conclusive evidence Larson testified that the bank contemplated the erection of this building, that it was understood that the bank's money was to build the building and that the formation of a separate corporation was first suggested by Mr. Moore in October of 1919 "to limit the liability for damage suits, bills and other things on that building."

The Scandinavian American Building Company was organized on November 18, 1919; Larson subscribed for all but four shares of its stock and Lindberg, Drury, Williamson and Lindeberg each subscribed for one share. The stock was of the par value of $100.00 (Ex. 179, p. 985 *et seq.;* Ex. 178, p. 1256).

Lot ten adjoining the two lots above described and referred to as the "Drury lot" was deeded to the building company by warranty deed, date November 10, 1919, but the deed was not delivered until Feb. 9, 1920 (Ex. 332, p. 1251 *et seq.*).

On February 25, 1920, the bank conveyed to the building company the title to the two lots upon which the old building stood by warranty deed (Ex. 325, p. 1194). This transaction, as authorized by the trustees of the bank, is set forth in the minutes of the directors' meeting of the bank and in a certificate delivered to the bank by the building company. The bank minutes are found in Exhibit 181 (Tr. p. 1005 *et seq.*), and contain the following record of the transaction:

Mr. Drury presided and called the meeting to order and a quorum being present, the following business was transacted:

The Board next considered the matter of the transfer of the property owned by the Bank, being its former site and described as:

Lots 11 and 12, in Block 1003,
"Map of New Tacoma, W. T."

to the Scandinavian American Building Company This property being encumbered with a mortgage in the principal sum of $70,000, and the Scandinavian American Building Company having acquired lot 10 adjoining, proposes to erect a sixteen-story office building upon the three lots and for the purpose of financing the erection of said building, proposes to borrow $600,000, and execute therefor a first mortgage upon said premises and in addition thereto to issue second mortgage bonds against said premsies in the principal sum of $750,000, bearing interest

at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years and in order to make the proper financial arrangements, it will be necessary that the title to said premises be vested in said Scandinavian American Building Company and the first mortgage placed against said premises before any work or construction of the building shall commence and before any contract shall have been let for the erection or construction of said building, and the Scandinavian American Building Company agreed to execute to the bank a temporary agreement or certificate, by the terms of which it agrees to execute and deliver to this bank, second mortgage bonds of the par or face value of $350,000 in payment for said premises, such bond issue to be for not in excess of $750,000, bearing interest at 6 per cent per annum, payable semi-annually and to run for a period of fifteen (15) years and to contain a provision to the effect that the income from said bonds shall, up to two (2%) per cent of the par value of such bonds, be tax free. After discussion, the following resolution was offered and its adoption was moved by Mr. Larson, seconded by Mr. Lindberg and carried, to-wit:

WHEREAS, the SCANDINAVIAN AMERICAN BANK OF TACOMA is the owner of lots 11 and 12 in block 1003, in "Map of New Tacoma, W. T." situated in Pierce County, Washington, which property is at the present time encumbered by a mortgage in the principal sum of $70,000, and

WHEREAS, SCANDINAVIAN AMERICAN BUILDING COMPANY, a corporation, organized under the laws of the State of Washington, has proposed to purchase said property for the consideration of $350,000 and proposes to erect upon said premises and lot 10 adjoining, a modern office building of approximately sixteen stories in height and to provide the ground floor thereof with space and accommodations for a Metropolitan banking institution, which space shall be reserved for the use of this bank upon a rental to be agreed upon, and

WHEREAS, for the purpose of financing the construction and erection of said building, the following arrangement has been entered into by said SCANDINAVIAN AMERICAN BUILDING COMPANY, to-wit:

A first mortgage for the principal sum of $600,000, to be executed by said SCANDINAVIAN AMERICAN BUILDING COMPANY, upon all three lots, which said mortgage must be executed and recorded before actual construction shall begin and before any contract for such construction shall have been let and a series of second mortgage bonds of the total par value of $750,000, to be executed and secured by a second mortgage on said premises, which said bonds shall run for a period of fifteen (15) years and bear interest at 6 per cent per annum, payable semi-annually and contain a covenant exempting the income thereof equal to 2 per cent of the total par value of said bonds exempt

from taxation by the Federal Income Tax Laws, and

WHEREAS, said SCANDINAVIAN AMERICAN BUILDING COMPANY cannot execute said first mortgage or said second mortgage and the bonds to be secured thereby until it shall first have acquired title to said premises, and

WHEREAS, said SCANDINAVIAN AMERICAN BUILDING COMPANY has agreed to execute and deliver to SCANDINAVIAN AMERICAN BANK OF TACOMA second mortgage bonds hereinbefore referred to of the par value of $350,000 in payment for said real estate as soon as the same can expediently be prepared and be a second mortgage lien upon said premises, and

WHEREAS, temporarily, said SCANDINAVIAN AMERICAN BUILDING COMPANY will execute a certificate or agreement agreeing to so deliver said bonds as soon as the same can be executed as above provided,

NOW, THEREFORE, BE IT RESOLVED, that the President and Cashier of SCANDINAVIAN-AMERICA NBANK OF TACOMA be and they are hereby authorized, directed and empowered to execute and deliver to said SCANDINAVIAN-AMERICAN BUILDING COMPANY a warranty deed of conveyance to said lots 11 and 12, in block 1003, "Map of New Tacoma, W. T." upon receiving from said SCANDINAVIAN-AMERICAN BUILD I N G COMPANY a certificate or agreement agreeing to

deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA, within four (4) months from the date hereof, bonds of the par value of $350,000, bearing interest at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T."

It being expressly understood and agreed that the total par value of all of said second mortgage bonds shall not exceed the sum of $750,000.00.

The Directors next discussed the advisability of holding meetings of the Board at regular intervals and it was moved, seconded and carried that regular meetings of the Board shall hereafter be held on the second and fourth Wednesday in each month.

There being no further business, the meeting, on motion, adjourned.

CHARLES DRURY,
Chairman.
Attest: M. M. OGDEN,
Secretary.

The court will notice that this meeting was held on February 10, 1920, and that it recites that the $600,000.00 first mortgage was to be executed for the purpose of "*financing the construction and erection of the building*".

On February 20th the Building Company in conformity to the agreement as expressed in the fore-

going resolution delivered to the Bank the Certificate therein provided for, being Exhibit 184 (Tr. p. 1020 *et seq.*), as follows:

CERTIFICATE AND AGREEMENT.

THIS INDENTURE made this 20th day of February, 1920,

WITNESSETH:

That WHEREAS pursuant to resolution of SCANDINAVIAN-AMERICAN BANK OF TACOMA, adopted at a meeting of the Board of Directors of said SCANDINAVIAN-AMERICAN BANK OF TACOMA on the 10th day of February, 1920, a copy of said resolution being attached hereto and marked Exhibit "A" and by this reference made a part hereof as though set forth in full herein, the SCANDINAVIAN-AMERICAN BUILDING COMPANY agreed to execute to SCANDINAVIAN-AMERICAN BANK OF TACOMA, a certificate to deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA, bonds of the par value of $350,000, bearing interest at 6 per cent per annum, payable semi-annually and secured by a second mortgage upon

> Lots 10, 11 and 12, in Block 1003, "Map of New Tacoma, W. T." situated in Pierce County, Washington,

the total issue of said second mortgage bonds not to exceed the sum of $750,000, and

WHEREAS pursuant to said resolution said SCANDINAVIAN-AMERICAN BANK OF TACOMA has executed and delivered to SCANDINAVIAN-AMERICAN BUILDING COMPANY this day a warranty deed of conveyance to said Lots 11 and 12, described in said resolution.

NOW THEREFORE and for and in consideration of the execution of said deed the undersigned, SCANDINAVIAN-AMERICAN BUILDING COMPANY does hereby agree to execute and deliver to SCANDINAVIAN-AMERICAN BANK OF TACOMA, within a period of four (4) months from the 10th day of February, 1920, mortgage bonds of the face or par value of $350,000, being a part of a total issue of $750,000; said bonds to bear interest at 6 per cent per annum, payable semi-annually and to contain a tax free covenant with respect to the income thereon as is provided in said resolution and to be secured by a mortgage upon

> Lots 10, 11 and 12 in block 1003, "Map of New Tacoma, W. T." situated in Pierce County, Washington,

and upon the delivery of said bonds this certificate to be returned to the undersigned.

IN WITNESS WHEREOF this certificate is executed by said SCANDINAVIAN-AMERICAN BUILDING COMPANY, by its President and Sec-

retary thereunto duly authorized, this 20th day of February, 1920.

SCANDINAVIAN-AMERICAN BUILDING COMPANY,
By CHARLES DRURY,
President.
By J. V. SHELDON,
Secretary.

And, as we have said, the deed was delivered on February 25th.

The building company then proceeded to make contracts with the various contractors for the erection of the building and the furnishing of the material and labor therefor. With the exception of three or four, these contracts all contained clauses whereby the contractor expressly waived the right given by statute to a lien and agreed not to file a lien. (See Art. XIV pp. 187, 188; Art. XIV p. 389; Art. XIV, p. 316).

These waiver clauses were necessary for the reason that the Metropolitan had particularly specified in its commitment that the contracts with the contractors should contain a clause subordinating their lien rights to the lien of its proposed mortgage. (Ex. 177, pp. 981 and 984).

"When the $600,000.00 mortgage was arranged for it was understood that would take up the $70,000.00 Penn Mutual mortgage" (Tr. p. 1045).

On March 10, 1920, the building company gave a mortgage for $600,000.00 running to the broker,

G. Wallace Simpson (Ex. 180, p. 992). This was done in order that it might be used by him to obtain money for the construction of the building pending its completion, when the $600,000.00 could be obtained from the Metropolitan. This mortgage upon its face bears irrefutable evidence that it was the intention that it ultimately should be assigned to the Metropolitan, since it contains all the terms specified by the Metropolitan, was prepared by the Metropolitan attorneys and was payable at the office of the Metropolitan. It was the intention to use this mortgage and the balance of the $750,000 bond issue to finance the construction of the building, and the directors of the bank were given to understand that these second mortgage bonds had been placed and would be sold as soon as they were issued, so that the money would be available and the cash paid rather than the bonds. (Tr. 1018).

In fact, this second mortgage bond issue was never executed, and all of the money used by the building company in the erection of the building was drawn from the coffers of the bank; this amounted in all to more than $500,000.00 in cash.

On October 7th, 1920, Simpson assigned this mortgage to the bank (Ex. 180½, Tr. p. 1003), and, in fact, the mortgage was in the possession of the bank before any large advances were made to the building company by the bank — that is, in June of 1920.

On January 15, 1921, the bank failed and passed into the hands of the State Banking Department for liquidation. On January 17th, 1921, the Bank Commissioner of the State appointed Forbes Haskell as Special Deputy Bank Commissioner to assist him in the duty of liquidating and distributing the assets of the bank among its depositors. (Ex. 330, p. 1228). On January 18th this action was begun.

The Penn Mutual or $70,000.00 mortgage was then unpaid and four months overdue, and Haskell was notified by the insurance company that it would insist on the 12% interest which the mortgage provides is to be paid after it became due, unless it was taken care of at once, and further notified that unless they were paid at once, they would start foreclosure proceedings. (Tr. 5. 1215). On February 23, 1921, Haskell obtained an order from the Superior Court directing him to take an assignment of the mortgage, the court finding that it was for the best interest of the creditors of the bank that it be taken up (Ex. 335, Tr. p. 1217), and he purchased it with funds which came into his hands as Deputy Supervisor, taking an assignment thereof, and paid the sum of $72,366.35, that being 8% on the mortgage from its due date, and representing a compromise between the 6% called for by the mortgage and the 12% provided for after default.

On March 31, 1921, in conformity with the Administrative Code passed by the Washington Legislature in 1921, the former Bank Commissioner was

retired, the title of the office changed to Supervisor of Banking of the State of Washington, and Haskell was reappointed by the incoming Supervisor, J. P. Duke, as Special Deputy Supervisor, and as such assigned this mortgage to his superior, J. P. Duke.

According to all the books and records of the bank and according to the statement of its officers, except Larson, this $600,000.00, or Simpson mortgage, which had been assigned to the bank, was held by the bank as collateral security for all the indebtedness to the bank of the building company.

THE $600.000.00 MORTGAGE.

Prior to the incorporation of the Scandinavian American Building Company it was the intention to form a corporation for the purpose of erecting and operating the proposed building, as is shown by the letters to which we have called attention in discussing the facts with reference to the $70,000 mortgage. It was intended that the building corporation should buy the equity of the bank in the old building and that the only interest the bank should have in the new building would be a lease of the banking room for a long period of time. (Ex. 199-203).

After the building company was organized and had become authorized to do business under the laws of the State of Washington in 1919, its books of account show that it paid for the cancellation of certain leases in the old building, paid its corporation license fee and Simpson's and other expenses and

paid for the Drury lot on February 9, 1920 (Ex. 350, Tr. p. 1142). It then acquired the title of the bank to its property under the agreement which we have mentioned and set forth (Ex. 184), and began to make its contracts with the contractors and materialmen who are the lien claimants in this action. None of these parties can claim that they thought that they were dealing with the bank, in view of the written contracts with the building company, which they then signed. We believe this is not claimed by any of them. As far as the complainant, McClintic-Marshall, is concerned, it cannot even say that it dealt with the building company, in reliance upon any record title to any property, for as a matter of fact its contract was made before the building company had acquired any title whatsoever to any of the real property. Its contract was dated February 5, 1920 (Tr. p. 40).

When the building corporation was organized, Larson subscribed for 1996 out of its total capital of 2000 shares. The other four shares were subscribed by Williamson, Drury, Lindberg and Lindeberg (Tr. pp. 987-988). These five gentlemen owned only 298 out of 4000 shares of the capital stock of the bank, and, in fact, owned less than 1600 out of 10,000 shares of the capital stock of the bank after the capital was increased in April of 1920 (Tr. p. 1236). So that the stockholders in the building company were by no means identical with the stockholders of the bank. Larson claimed that he sub-

scribed for this stock on behalf of the bank. If he had this secret intention, it was unknown to every other member of the board of directors of the bank, and, so far as this record shows, was unknown to every other stockholder in the bank. In fact, this record is replete with evidence that this was not a fact. The letters to which we have called attention, preliminary to the organization of the corporation, bear irrefutable evidence that it was the itnention that "finally the only interest the bank would have in the property would be a lease on the banking room and basement" (Ex. 199); that the building company would "purchase the property from the bank and Drury, construct the building and operate it" (Ex. 203). G. G. Williamson, one of the bank's directors and its attorney, flatly contradicted Larson: "It was absolutely represented at the inception that Mr. Larson was subscribing for all of that stock except one share each for the other directors. Mr. Larson was to get the money for the purchase of that stock, he was subscribing for it in his own name, but I do not suppose anybody—at least I did not think that Mr. Larson was going to furnish $200,000, but he said he had arranged that." (Tr. 1109). Chilberg, who was then the president of the bank, says: "This stock was to be sold. The original plan was to sell it to anybody that would buy it. I suppose somebody would subscribe it as those things are usualily done until it could be placed. (Tr. p. 1137). Lindberg, another director

of the bank, says: "There was not, at any meeting of the trustees which I attended, any authorization to Mr. Larson to subscribe for all of the shares of the building company's capital stock except four, for and on behalf of the Scandinavian American Bank." (Tr. p. 1127). Lamborn, another director, says: "I am not sure I ever knew of it. My consent was never asked for the purchase of this stock." (Tr. p. 1172-73). In fact, everyone else even remotely connected with the bank states that it was the understanding at that time that the arrangements for the financing of the construction of this building had been completed in the East and that Larson represented to them that not one cent of the bank's money was to be used for the construction of the building. Williamson says: "I resigned because it had been absolutely represented to the board of directors that the bank was not going to put a dollar in that building. There had been representations all along made to the board, relied upon by the board, and I do not think there was a man on the board that did not have that belief and firm conviction. The first time it ever came to my knowledge that the bank had advanced a dollar was the time I told you about, and I got out just as quick as I could." (Tr. p. 1118-1119). That Williamson did resign then is shown by his written resignation (Tr. p. 1016). Lindberg: "I heard Larson had the building financed; that was the purpose of forming this

company." (Tr. 1126). "I did not understand then that the bank would have some stock in the building. I did not hear that the bank, after that, would have control of the building." (Tr. 1128). Thompson, also a director of the bank, testified: "I wished to have an assurance by Mr. Larson that the building . . . would be financed . . . independently of the bank, and that none of the bank's funds would be used. That impression was carried in my mind all the time I was a director of the bank, that the financing of the new building would be done outside the bank." (Tr. 1148). Sheldon, another trustee, testified: "I was told by Mr. Larson that a building was to be built, costing seven or eight hundred thousand dollars, that could all be financed outside the bank." (Tr. 1153). Lamborn: "I did not ask him specifically as to the use of the funds of the bank in this building; that was not discussed at all. It was not necessary, because he had said he had financed it and the money was ready in New York." (Tr. 1172). Indeed, Larson, at another place in his testimony, says: "It was never the intention that the Scandinavian American Bank of Tacoma was intended to finance that building. Never was at any stage of the game the intention that the bank should finance any part of it." (Tr. p. 1084).

As far as the credibility of the witness Larson is concerned, he had conceived the idea that the supervisor and his attorneys had been instrumental in having some thirty-odd criminal indictments re-

turned against him, and repeatedly showed his hostility to the supervisor, and repeatedly refused to answer questions propounded by the supervisor's attorneys upon the ground that they would tend to incriminate him (Tr. 1051, 1084, 1085 and 1088), although he had no such fears when asked questions by the other attorneys in the case. So that, notwithstanding Larson's testimony, there is no question but what this stock was subscribed for by him as an individual and for his individual account. This is further borne out by the letters written to Larson by Mr. Hay, who was then the Bank Commissioner of the State of Washington. Under date of June 21, 1920 (Ex. 219, Tr. p. 1086, at 1088), Hay wrote to Larson, forbidding the bank to carry any of the second mortgage bonds and stated as follows:

"As I recall it, you told me at one time in Tacoma that your building was to be financed without using one cent of the bank's funds."

Again, under date of Nov. 12, 1920 (Ex. 221, Tr. p. 1090), he wrote:

"At this time it is my desire that the building be constructed and brought to completion without having the Scandinavian American Bank in any way made a party thereto, and I desire particularly to remind you that you must use great care in order that the bank may not be allowed to appear in any way as a guarantor of any bills or accounts in connection with the construction of the building."

At the time that Larson returned from New York with the letter of the Metropolitan, dated September 17, 1919 (Ex. 193), wherein the Metropolitan had agreed to lend $650,000.00 when the building was completed, Larson says he thought that they were ready to proceed with the building (Tr. p. 1041). At that time the scheme for the financing of the building was as follows: The stock was to be placed as Larson had represented to Williamson and Chilberg, respectively the attorney and president of the bank; the Scandinavian Bank of Seattle was to carry $150,000 of second mortgage bonds, if necessary, and the Metropolitan was to lend $650,000.00. At that time Webber had not made his plans, and the understanding was that the building was to cost not to exceed $860,000.00 (Tr. p. 1040). These were the circumstances surrounding the incorporation of the building company. Thereafter, the Metropolitan loan committee, after an appraisal of the land, reduced the amount of the loan to $600,000.00. In order to raise the money pending the construction of the building — the Metropolitan having agreed to lend it only when the building was completed — the consent of the Metropolitan was obtained to an arrangement whereby the Metropolitan would take an assignment of the mortgage, and would permit it to be executed to someone else for the purpose of raising money pending the construction of the building (Ex. 222, Tr. 1093; Ex. 224, Tr. 1097), and under an

agreement, atferwards reduced to writing (Ex. 182, Tr. pp. 1010-1011), whereby Simpson declared that he held it in trust, and that any moneys derived therefrom were to be held by him in trust for the use and benefit of the building company, this mortgage was executed. This is the mortgage in controversy. It runs to G. Wallace Simpson, as mortgagee (Ex. 180, Tr. 882 *et seq.*). It was prepared by the Metropolitan attorneys, who personally investigated the building site on the day it was recorded, to ascertain that no work had been done thereon, and who insisted that it be recorded before any work had been done; it is payable at the office of the Metropolitan in New York. A few days prior to that time the building company had obtained title to the bank's property under the agreement to which we have called attention (Ex. 184). At that time Webber's plans had been completed and it was known that the building would cost slightly in excess of one million dollars (Tr. p. 1047). This was to be raised by the Simpson or Metropolitan mortgage of $600,000.00, a second mortgage bond issue of $750,000.00 and the stock. At that time Webber and Simpson had represented that the second mortgage bond issue had been placed and the money therefor would be obtained as soon as it was executed and delivered (Tr. 1018). So that it was contemplated at that time that the $350,000.00 due to the bank would be paid in cash before the tenth of June (Tr. 1019).

The contractors state that at the time they entered into their contracts it was represented to them that the building company had arranged for this $400,000.00, and that the Metropolitan mortgage of $600,000.00 would be available for the completion of the building. They claim that this was such a fraud upon them that they are not bound by the waiver clauses contained in their contracts. This shows conclusively two things: First, that the contractors knew of this $600,000.00 mortgage at the time they signed their contracts; second, that the building company was relying upon the statement of Simpson and Webber that these bonds had been placed.

The bank advanced the building company $15,000.00 on its note, on December 8th, 1919 (Tr. p. 1031, Ex. 188). This was doubtless in order that it might take care of the preliminary costs, as shown by the building company's books of account (Ex. 352, Tr. p. 1246). On April 14, 1920, the bank advanced another $25,000, and on May 21, 1920, another $25,000. These loans were ratified by the board of directors of the bank (Tr. pp. 1013-1014), and it was then that Williamson resigned from the directorate of the bank.

On June 25, 1920, Larson deposited $200,000 in the bank to the credit of the building company, using therefor the ordinary deposit slip, to which was attached a notation signed by Larson, ordering that "Account No. 13—stocks and securities"—be

debited, and the notation made, "Payment in full stock subscription, Scandinavian American Building Company." (Ex. 190, Tr. 1034-5). This was the entire bank record of this transaction. This was done in the face of the letter written only four days before, and dated June 21, from the Bank Commissioner, to which we have called attention (Ex. 219, pp. 1086-1088), and without the knowledge of the other directors of the bank. Williamson says: "I did not know a thing in the world about it directly or indirectly" (Tr. 990). Again, at page 1168 *et seq.*, he says: "I will state that I did not have any conversation with Mr. Larson in reference to the issuance of any stock. I did not know until after the 8th of January, 1921, that the Scandinavian American Bank had any stock in the building company, . . . that is the first time I knew the Scandinavian American Bank had anything to do with the building company's stock directly or indirectly. The matter had never been mentioned to me by Mr. Larson or anybody else up to that time." Lindberg says: "I was not present when the stock of the company was purchased by the bank; the first I heard that Mr. Larson had the stock was when I read it in the paper after the bank closed" (Tr. p. 1125). Lamborn says: "I am not sure I ever knew about it. My consent was never asked for the purchase of this stock" (Tr. 1172-3). Sheldon says: "The first time I found that the building had obtained a credit, I wanted to know

where the credit had come from and I proceeded to look it up and that is the entry I found. I mentioned it to Mr. Larson afterwards. As a trustee of the bank I was not at any time consulted in reference to the purchase of this stock of the Scandinavian-American Building Company, and had no knowledge of that transaction prior to the time I discovered it myself a few days after June 25, 1020" (Tr. 1159). Others of the officers of the bank considered this as a loan to the building company with the stock as a pledge. Ogden says: "Under the circumstances as I see them now, that the bank advanced that much money to the building company and naturally was entitled to interest on the investment. The bank record shows that the bank at one time bought the stock and later shows that the bank charged interest on the money it bought the stock with" (Tr. 1033). Sharp says: "I find on the books (of the building company) the stock purchase payment of June 25, recited on the books as a deposit *by O. S. Larson*, account capital stock, $200,-000. That entry would be made from the deposit slip, which the bank would have" (Tr. 1111). On December 31, 1920, Larson over his own signature directed the employes of the bank to charge interest at six per cent on this sum (Ex. 235, Tr. 1120-2). Morse says: "I put that there on Mr. Larson's instructions" (Tr. 1184).

Although Larson's certificate of stock and the certificate running to the bank are dated June 25,

1920, the date upon which Larson passed this credit to the building company, the stock was not in fact issued at that time, but was issued apparently some time after the bank had been examined in December of 1920. In this connection Larson says: "It seems to me there was some discussion in December between Mr. Freeman and Mr. Drury about the fact that the certificate had never been issued to the bank" (Tr. 1044). Lindberg says: "I endorsed a certificate for one share after the bank was closed" (Tr. 1127). Williamson says that at the time he endorsed his certificate of stock it was stated to him "that the bank examiner had examined the bank in December and found that the bank was carrying $200,000 in stocks and the bonds represented by the building company's stocks. The stock was not there and they issued the stock and got all of it but the one share I had" (Tr. p. 1168). Sheldon says: "The records showed a purchase of this stock and the bank did not have the actual stock until December, 1920, it was not issued, but the books showed as early as June 25, 1920, that the stock had been purchased" (Tr. p. 1162). Again he says: "I mean the certificates of stock were not signed until December, 1920." "It was subscribed for by Larson, but the stock was not issued" (Tr. p. 1165). So that all that the bank's records showed at that time, and until December, was a deposit slip of the building company showing a deposit of $200,000 to its credit, to which was attached a note by Larson or-

dering account No. 13, Stocks and Securities, charged with this item and the entry made in that account in accordance therewith. The stock itself was not there — it had never been issued. It was therefore unintelligible without an explanation, and in fact the Bank Commissioner wrote Larson for an explanation of it (Ex. 280, Tr. p. 1089) in August, but received no reply.

The $600,000.00 mortgage, although running to Simpson, as the court will notice, was payable at the office of the Metropolitan Life Insurance Company (Ex. 180, Tr. 992), and the architects of the Metropolitan were paid their fees, analyzed the cement that went into the foundations of the building, received frequent reports as to the progress of the work, and even went so far as to insist upon certain changes being made in the plans. There can be no question, therefore, but that during all this period the Metropolitan itself, and everybody connected with the transaction, considered that the Metropolitan would be the ultimate purchaser of this mortgage, and that it was made to Simpson merely in order that it might be used for the purpose of obtaining loans pending the completion of the building (Ex. 222, Tr. p. 1093 and Ex. 224, Tr. p. 1097 *et seq.*). The declaration signed by Simpson states: "Said note and mortgage having been made to me as a matter of convenience and to enable me to raise funds for the Scandinavian American Building Company for the purpose of enabling it to erect a

building upon the premises described in said mortgage (Ex. 182, Tr. p. 1010). As a matter of fact, however, the mortgage was at all times in the possession of the bank, and on June 28, three days after Larson had made this unauthorized stock loan to the building company, he whote Sheldon, the secretary of the building company and one of the directors of the bank, to keep the Simpson mortgage and note "in a safe place ready to be delivered when the funds are to be turned over," and on September 24th Sheldon took a receipt from Larson for these papers (Ex. 248, Tr. pp. 1155-56). Sheldon says he delivered the note and mortgage to Larson in June: "He told me he was going to take them East and get an assignment from Simpson to the bank" (Tr. 1157-1167), and Larson thereafter directed the bank clerks to charge interest on the stock loan, saying "enter this voucher up as a real estate loan and hold until advance is secured on the mortgage, then charge same to account of Scandinavian American Building Company" (Ex. 235, p. 1120). Prior to June 11, Larson was attempting to get the Metropolitan to make advances on the strength of this mortgage, and on that date they wrote a letter in which they declined to make such advances, but stated that "with our commitment and our mortgage of record, I should think that you could arrange to finance the matter with your own funds or those obtained from other sources for temporary use" (Ex. 214, Tr. p. 1080). Larson began lending

money to the building company on the strength of the $600,000.00 mortgage. This is shown by the fact that when the Metropolitan declined to make advances on the strength of this mortgage and suggested that the bank could do so "with our commitment and our mortgage of record," Larson immediately began to make these loans. This letter is dated June 11th; it would not have reached Tacoma until June 17th or 18th, and Larson made the stock loan within a week, June 25th. And during this time, and in fact up until the failure of the bank, there was a constant endeavor to use this mortgage in order to obtain a temporary loan. This is shown by innumerable letters passing during that time (Ex. 185-187, Tr. p. 1026; 182, Tr. p. 1010; 215, 216, 217, Tr. 1082-3; 222, Tr. p. 1093; 224, Tr. p. 1096; 229, Tr. p. 1105; 336, Tr. p. 1218; 342, 343, 344, 345, 346, Tr. pp. 1224 to 1228).

There is some dispute in the evidence with reference to whether or not this assignment of mortgage was taken for the protection of the bank, Larson claiming that he took the assignment from Simpson, not for the protection of the bank, but because Simpson was "not in the very best of health and I did not want to get the mortgage tangled up in his estate" (Tr. p. 1048). He goes on, however, to state, in the same breath, that Simpson went from Philadelphia to Chicago in order to execute this assignment, and his telegrams to Sheldon at that time indicate that Simpson was going from Chicago to Bos-

ton "trying Evans estate, Hancock and Massachusetts Mutual" (Ex. 346, p. 1228), so that it is evident that Mr. Simpson's state of health was not interfering with his business. On the other hand, Sheldon states positively that Larson took the papers as early as June, saying that he was going to take them East to get an assignment for the protection of the bank (Tr. 1161-62), and that this was officially passed upon at a board meeting thereafter (Tr. 1163). In this Sheldon is corroborated by Lamborn, who says that "I think Mr. Drury mentioned at the time that any advances made at the time were absolutely safe and covered by mortgage or bonds, I cannot recall which" (Tr. p. 1172), and by Mr. Hay, who was then Bank Commissioner (Tr. p. 1178).

This assignment by its terms ran to the bank, and thereafter Larson directed Morse, the assistant note-teller, to hold the mortgage, note and assignment as collateral to advances made by the bank to the building company, and in fact this note and mortgage remained in the bank's records with the assignment until the failure, showing on the face of the entries carried in connection therewith that the mortgage and note were held as a real estate loan (Ex. 185, p. 1026; 187, p. 1026; 188, p. 1030).

This assignment was dated October 7, 1920 (Ex. 180½, Tr. p. 1003). At that time all of the contractors who were furnishing labor or material for the erection of the building had received their pay-

ments in accordance with the terms of their contracts, with the exception of the McClintic-Marshall Company, $45,820.66 being due to that company at that time, but unpaid because of a dispute between the building company and that company relative to the delay of the McClintic-Marshall Company in furnishing the steel in accordance with the terms of the contract, which required the steel to be delivered before May 6, whereas in fact the steel was not delivered until November. There was also a dispute about faulty fabrication of steel delivered, and the contract with that company required the submission of all disputes to a board of arbitrators, which is a valid and binding contractual obligation, both in the State of Washington and in the State of Pennsylvania, the domicile of the McClintic-Marshall Company.

The Washington Banking Code is found in Remington's Compiled Statutes of Washington, 1922, Sec. 3208 *et seq.* The title of the official charged with the aodministration of this law has been changed by each Legislature; first it was the "Bank Examiner," then the "Bank Commsisioner," then the "Supervisor of Banking." The examiner and commissioner were each appointed directly by the Governor, but the Supervisor is an appointee of the Director of Taxation and Examination, who in turn is an appointee of the Governor.

Under these laws, this official passes upon the organization of State banks, grants them in the first

instance the authority to conduct business (Sec. 3229), and all banks must file sworn reports periodically with him (Sec. 3212), and he must examine them at least once a year (Sec. 3214). If he decides that a bank is insolvent, he may take possession immediately without notice (Sec. 3267). He then collects the assets and liquidates the business, and for that purpose may appoint a special deputy, and files a certificate of such appointment with the county clerk, but can sell, compound or compromise bad or doubtful debts and sell real and personal property only with the approval of the court (Sec. 3269). He publishes notice requiring proof of claims to be made to him within ninety days, approves or rejects all claims, and the claimant must begin action upon a rejected claim within three months, otherwise it is barred (Sec. 3270). He fixes all charges and expenses for liquidation subject to the approval of the court (Sec. 3271). He makes and files his inventory and a list of all claims presented to him showing his action thereon, with the county clerk (Sec. 3272), and declares dividends subject to the approval of the court (Sec. 3273). Any interested person may contest his allowance of a claim before the court in a summary manner (Sec. 3274), and his decision upon the facts requiring him to take possession of the bank must be contested by the bank within ten days and is also heard in a summary manner (Sec. 3275). The power to appoint a receiver is taken away from the courts (Sec. 3276).

After all expenses and claims have been paid in full, he turns any property remaining in his hands over to an agent elected by the stockholders, who converts the assets into cash and distributes them (Sec. 3277).

So that the supervisor is in no sense an officer or agent of the court; he is neither appointed by the court, nor is he accountable to the court. Nor is he in any sense an agent or representative of the bank or of the stockholders of the bank. As soon as he has paid the bank's creditors from its assets, his duties are finished, unless then the stockholders make him their a gent.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding in the decree that the mortgage referred to in paragraph XXXIV of the decree known as the Penn Mutual Life Insurance Company mortgage executed by J. E. Chilberg and wife to said company and subsequently purchased by John P. Duke, as Supervisor of Banks of the State of Washington, and assigned to him as such state officer, is not a valid mortgage constituting a first lien upon the real property described in their cross-complaint and described in said decree and prior to any and all other claims and liens, for the reason that said mortgage is a valid mortgage constituting a lien upon the premises for a period of several years prior to the erection of any building

thereon upon which lien claims are asserted in this action. Said mortgage has never been paid and now is legally owned by a state official in the process of liquidating the affairs of the insolvent bank.

II.

The court erred in refusing to enter a decree, as prayed for in these appellants' cross-complaint, foreclosing the so-called Penn Mutual Life Insurance Company mortgage as a lien on the premises of the Scandinavian American Building Company prior to any and all other liens and claims.

III.

The court erred in decreeing that the taking of an assignment of the said Penn Mutual Life Insurance Company mortgage by J. P. Duke, as Supervisor of Banks of the State of Washington, operated as a payment of and to discharge said mortgage and that by reason thereof and for want of equity appellants' cross-complaint should be dismissed, for the reason that the said J. P. Duke was not an agent or representative of the bank, but was acting in his official capacity as an officer of the State of Washington in the process of liquidating the affairs of said bank as provided by the laws of said state, and was authorized and directed by the Superior Court of the State of Washington, in and for the County of Pierce, in charge of liquidation of said bank, to purchase said mortgage and take an assignment thereof for the best interests of the creditors of said bank.

IV.

The court erred in holding the lien claims of McClintic-Marshall Company, Tacoma Millworks Supply Company, E. E. Davis & Company, H. C. Greene, Mullins Bros., Crane Company, Far West Clay Company, Savage-Scofield Company, and the other lien claims allowed in said decree, or any of them, prior in right to the Penn Mutual mortgage, for the reason that said mortgage was a valid and binding lien upon the premises for a number of years prior to the initiation of any other lien right or claim.

V.

The court erred in ordering the application of any part of the proceeds of the sale of the premises and property of the Scandinavian American Building Company to the payment of any liens and claims prior to the application thereof to the payment of the principal and interest of the said Penn Mutual Life Insurance Company mortgage to the said J. P. Duke, as Supervisor of Banks.

VI.

The court erred in holding in the decree that the mortgage for $600,000.00, known as the G. Wallace Simpson mortgage, and referred to in paragraph XXXVI of the decree, executed by the Scandinavian American Building Company to G. Wallace Simpson, and afterwards assigned to the Scandinavian American Bank of Tacoma, is not a valid mortgage,

constituting a lien upon the real property and premises of the building company and prior to any and all other liens and claims, except the so-called Penn Mutual Life Insurance Company mortgage, for the reason that said mortgage was a valid mortgage of record prior to the initiation of any right or claim of lien on the part of any lien claimants in this action.

VII.

The court erred in refusing to enter a decree, as prayed for in appellants' cross-complaint, foreclosing the so-called Simpson mortgage as a lien on the premises of the Scandinavian American Building Company prior to any and all other liens and claims except the so-called Penn Mutual Life Insurance Company mortgage.

VIII.

The court erred in holding the lien claims of McClintic-Marshall Company, Tacoma Millworks Supply Company, E. E. Davis & Company, Far West Clay Company, and Savage-Scofield Company and the other claims and lien claims allowed in said decree, or any of them, prior to the right of the so-called Simpson mortgage, for the reason that said mortgage was a valid and binding lien upon the premises of the Scandinavian American Building Company prior to the initiation of any other lien rights or claims other than the so-called Penn Mutual mortgage, and that all of said lien claimants

had actual knowledge of the existence of said mortgage prior to the time of delivery of any material or the performance of any labor on the premises of the Scandinavian American Building Company.

IX.

The court erred in ordering the application of any part of the proceeds of the sale of the premises and property of the Scandinavian American Building Company to the payment of any liens and claims prior to the application thereof to the payment of the principal and interest of the said Simpson mortgage, except only the so-called Penn Mutual mortgage.

X.

The court erred in refusing to enter a decree, as prayed for in these appellants' second cross-complaint, establishing a lien upon the real property of the Scandinavian American Building Company in the nature of a purchase money mortgage which arose out of an agreement by which the Scandinavian American Building Company agreed to deliver to the Scandinavian American Bank of Tacoma bonds of the par value of $350,000.00, and secured by a second mortgage on the premises involved in this action, for the reason that the title to said lots and premises was transferred by the bank to the building company without any consideration other than the agreement to deliver the above bond within four months from February 20th, 1920.

XI.

The court erred in holding any lien claims or other claims prior to the so-called purchase money mortgage other than the Penn Mutual mortgage.

No receiver shall be appointed by any court for any bank or trust company nor shall any assignment of any bank or trust company for the benefit of creditors be valid, excepting only that a court otherwise having jurisdiction may in case of imminent necessity appoint a temporary receiver to take possession of and preserve the assets of such corporation. Immediately upon any such appointment, the clerk of such court shall notify the state bank examiner by telegraph and mail of such appointment and the examiner shall forthwith take possession of such bank or trust company, as in case of insolvency, and such temporary receiver shall upon demand of the examiner surrender up to him such possession and all assets which shall have come into the hands of such receiver.—Remington Compiled Statutes of Wash. (1922), Sec. 3276.

Whenever it shall in any manner appear to the State Bank Examiner that any offense or delinquency referred to in the preceding section renders a bank or trust company in an unsound or unsafe condition to continue its business or that its capital or surplus is reduced or impaired below the amount required by its articles of incorporation or by this act, or that it has suspended payment of its obligations or is insolvent, said examiner may notify such

bank or trust company to levy an assessment on its stock or otherwise to make good such impairment or offense or other delinquency within such time and in such manner as he may specify or if he deem necessary he may take possession thereof without notice. (Sec. 60, Ch. 80, L. 17.)—Remington Compiled Statutes of Wash. (1922), Sec. 3267.

Upon taking possession of any bank or trust company, the examiner shall proceed to collect the assets thereof and to preserve, administer and liquidate the business and assets of such corporation. With the approval of the superior court of the county in which such corporation is located, he may sell compound or compromise bad or doubtful debts and upon such terms as the court shall direct sell all real estate and personal property of such corporation. He shall deliver to each purchaser an appropriate deed or other instrument of title.—Remington Compiled Statutes of Wash. (1922), Sec. 3268.

The examiner shall publish once a week for four consecutive weeks in a newspaper which he shall select, a notice requiring all persons having claims against such corporation to make proof thereof at the place therein specified not later than ninety days from the date of the first publication of said notice, which date shall be therein stated. He shall mail similar notices to all persons whose names appear as creditors upon the books of the corporation. He may approve or reject any claim, but shall serve notice of rejection upon the claimant by mail or

personally. An affidavit of service of such notice shall be prima facie evidence thereof. No action shall be brought on any claim after three months from the date of service of notice of rejection.

Claims may be presented after the expiration of the time fixed in the notice, and if approved, shall be entitled to their proportion of prior dividends, if there be funds sufficient therefor, and shall share in the distribution of the remaining assets. (Sec. 63, Ch. 80, L. 17).—Remington Compiled Statutes of Wash. (1922), Sec. 3270.

When all proper claims of depositors and creditors (not including stockholders) have been paid, as well as all expenses of administration and liquidation and proper provision has been made for unclaimed or unpaid deposits and dividends, and assets still remain in his hands, the examiner shall call a meeting of the stockholders of such corporation, giving thirty days' notice thereof, by one publication in a newspaper published in the county where such corporation is located. At such meeting, each share shall entitle the holder thereof to a vote in person or by proxy. A vote by ballot shall be taken to determine whether the examiner shall wind up the affairs of such corporation or the stockholders appoint an agent to do so. The examiner, if so required, shall wind up such corporation and distribute its assets to those entitled thereto. If the appointment of an agent is determined upon, the stockholders shall forthwith select such agent by ballot. Such agent

shall file a bond to the State of Washington in such amount and so conditioned as the examiner shall require. Thereupon the examiner shall transfer to such agent the assets of such corporation then remaining in his hands, and be relieved from further responsibility in reference to such corporation. Such agent shall convert the assets of such corporation into cash and distribute the same to the parties thereunto entitled, subject to the supervision of the court. In case of his death, removal or refusal to act, the stockholders may select a successor with like powers.—Remington Compiled Statutes of Wash. (1922), Sec. 3277. Argument

The taking of testimony in this case was spread over a period of approximately two months, due to the fact that the court was continuously interrupted by the necessity of trying other cases both in Tacoma and in Seattle. Thereafter the court took the case under advisement and delivered his opinion, which is found in 281 Fed. 166, some six months thereafter, in which he held that the liens of the mechanics and materialmen were superior to the lien of both the mortgages held by the supervisor.

From an examination of the court's decision it will be observed that the facts and circumstances involved in the two mortgages are in many details very closely related, and an examination of the testimony will satisfy the court that they are interrelated even more closely than indicated in the court's opinion. For this reason our argument will

in many respects be applicable to both mortgages, and although we have attempted to present our arguments under various heads, we request the court to keep in mind the statement we have just made. For the purpose of convenience we present our argument under the following heads:

1. VALIDITY OF THE $70,000.00, FIRST MORTGAGE.

2. VALIDITY OF THE $600,000.00 MORTGAGE.

3. VALIDITY OF THE PURCHASE MONEY MORTGAGE.

4. EFFECT OF THE ARBITRATION CLAUSE IN THE McCLINTIC-MARSHALL COMPANY CONTRACT.

5. EFFECT OF LIEN WAIVER IN THE CONTRACTS OF LIEN CLAIMANTS.

VALIDITY OF THE $70,000.00, FIRST MORTGAGE.

The court in its decision, in a rather summary manner and without citation of any authority, denied this mortgage priority over the various lien claimants. We will analyze briefly the decision of the court, but deem it advisable to do so after we have presented our argument to sustain the priority of this mortgage over all other mortgagegs and liens.

The validity of this mortgage is attacked upon the theory that when the Bank Commissioner of the

State of Washington and his deputy, F. P. Haskill, purchased this mortgage and took an assignment thereof, the mortgage, by reason of said act, was extinguished; that the court will conclusively presume that the Bank Commissioner by said purchase was acting for the bank and with the *intention* of paying the obligation of the mortgage for and on behalf of the bank, and that there was a legal and binding obligation upon the bank to pay said mortgage, and the Bank Commissioner in purchasing said mortgage was merely discharging said obligation. This argument, however, is without merit for the following reasons:

1. The Bank Commissioner was not an agent of the bank but an officer of the State of Washington.

2. There was no intention on the part of the Bank Commissioner to pay the mortgage and extinguish the same; *intention* is the controlling factor in this transaction. This intention is to be gathered either from evidence or the circumstances of the transaction.

3. The Bank Commissioner was under no legal obligation to satisfy this mortgage and pay the debts secured thereby.

4. The bank, acting in its own behalf, could, after the building company breached its contract pursuant to which it obtained title to the lots from the bank, have purchased said $70,000.00 mortgage if necessary to protect its interests under said contract.

5. The lien claimants could not themselves have compelled the bank to pay off said mortgage except upon the express condition that the equities of the bank would be protected.

6. That the equity of the lien claimnats were in no manner altered by the transaction because of the fact that the mortgage was at all times prior to the claims of all lien claimants.

7. The statutes of the State of Washington expressly prohibit the appointment of a receiver to liquidate a state bank.

8. None of the lien claimants testified that they relied upon any warranty of title to the property.

9. At the time the McClintic-Marshall contract was entered into the title of the property was in the bank and was not transferred by the bank to the building company until at a later date.

THE BANK COMMISSIONER WAS NOT AN AGENT OF THE BANK.

We are fully satisfied that the error of the trial court in refusing to sustain the validity of the $70,000.00 mortgage as a first and prior lien was due to the fact that he utterly failed to distinguish the fundamental difference between the official capacity of the Bank Commissioner as a state official in the liquidation of the affairs of the bank and that of a receiver. In every instance where reference is made to the subject in his decision, he refers to the receiver of the bank and not to the

Bank Commissioner. Constant reference is made to Haskill as receiver for both the bank and the building company. The difference, however, was argued during the trial, and we are unable to explain why he should have ignored this difference and disregarded the decisions of the Supreme Court of the State of Washington where the vitally distinguishing features have been so forcibly pointed out, and this even so very recently; and also the Statutes of the ~~State of Washington~~ United States, which expressly prohibit the appointment of a receiver to liquidate a state bank, and also the decisions of the Supreme Court of the State of Washington, which expressly follow and state they follow the decisions of the Supreme Court of the United States on that subject.

We cite the following authorities:

Hansen v. Soderberg, 105 Wash. 255, 177 Pac. 827;

Kennedy v. Gibson, 75 U. S. 498;

Gibson v. Peters, 150 U. S. 342, 37 L. Ed. 1104;

Ex parte Chetwood, 165 U. S. 443, 41 L. Ed. 782;

U. S. v. Weitzel, 246 U. S. 540, 62 L. Ed. 872;

Weitzel v. U. S., 274 Fed. 101;

Greenfield Savings Bank v. Commonwealth, 97 N. E. 927;

Commonwealth v. Allen, 133 N. E. 625;

Bryan v. Bullock, 93 So. 182;

Allen v. Prudential Trust Co., 136 N. E. 410;

Cosmopolitan Trust Co. v. Nichol, 136 N. E. 403;

Witter v. Sowels, 32 Fed. 765;
Armstrong v. Ettlesohn, 36 Fed. 209.

We wish to emphasize the fact that the Supreme Court of the State of Washington, in an *en banc* decision concurred in by all judges of that court, expressly adopted and followed the rule laid down by the Supreme Court of the United States in holding that the State Bank Examiner of the State of Washington in liquidating an insolvent state bank was not acting as a receiver of a court but as an officer and agent of the State of Washington. The case referred to is that of *Hansen v. Soderberg*, 105 Wash. 255, 177 Pac. 827, in which the court calls attention to the fact that the state banking laws of Washington are in many respects similar to the provisions of the National Bank Act, and we quote to some extent the language of the decision:

"Without setting out in detail the corresponding provisions of the National Bank Act (U. S. Comp. St. 1916, par. 9821; Rev. Stat. par. 5234), it may be said that the statute of this state bears a striking similarity in many of its provisions to that act of Congress. Under the National Bank Act the comptroller of the currency administers the affairs of an insolvent national bank and determines the liability, if any, of the stockholders without resorting to a judicial inquiry. That act contains the provisions that the comptroller of the currency 'may, if necessary to pay the debts of such association, enforce the individual liability of the stock-

holders' (U. S. Comp. St. 1916, par. 9821). In effect this language is the same as that contained in the legislative act of this state above quoted.

"The United States Supreme Court, construing the Federal act, has held that the comptroller has power to decide when it is necessary to institute proceedings against the stockholders of an insolvent national bank to enforce their personal liability; that this question is referred to his judgment and discretion, and that his determination thereof is conclusive. In *Kennedy v. Gibson*, 75 U. S. (8 Wall.) 498, upon this question it is said:

" 'The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as may be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.' "

"The National Bank Act provides for the appointment of a receiver by the comptroller, and that the receiver acts under the direction of the comptroller. The view of the court, as expressed in *Kennedy v. Gibson, supra*, has been adhered to by that court in *Casey v. Galli*, 94 U. S. 673, and *United States v. Knox*, 102 U. S. 422" . . .

"So far as our inquiry discloses, no court of last resort in any state, when the precise question was directly presented, construing a law of its particular state, has taken the opposite view. This statement is made with full knowledge and after careful reading of all the authorities cited in appellant's brief." . . . "A holding that the state bank examiner may determine the difference between the liabilities and the assets of an insolvent bank and the necessity for an assessment of the stock gives the act a construction which renders it speedy, efficient and economical. If the act should be construed that the state bank examiner must resort to a court of equity to have these matters determined before he can bring an action upon the stock, the procedure would be substantially the same as it was prior to the passage of the statute. It is well known that, under that procedure, the administration of insolvent banks was subject to much delay and involved, many times, a large amount of costs and expenses. It is to the interest of the creditors, and also the stockholders, that the affairs of an insolvent banking institution should be wound up

with reasonable expedition and with no more expense than the necessities of the situation may require. A review of the act of 1915 and a comparison of it with the National Banking Act indicate that the legislature must have had the Federal act in mind at the time that the statute was passed, and also the construction which the United States Supreme Court had given the Federal act. We think that the state bank examiner, in proceeding as he did in this case, was acting within the power with which he was clothed by the statute." . . .

"The appellant further contends that if a construction be given the statutes such as above indicated, then it cannot be sustained because it confers upon a ministerial officer judicial power. This question has also been decided against appellant's contention by the United States Supreme Court. *Bushnell v. Leland*, 164 U. S. 684; *In re Chetwood*, 165 U. S. 443. In the case last cited it is said:

" 'It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection, because vesting that officer with judicial power in violation of the Constitution, that we have recently declined to re-examine that question.' "

"It is possible that, in cases analagous in principle, the decisions of this court could be resorted to as sustaining the proposition that the act does

not confer judicial power upon the state bank examiner in violation of the Constitution. At the risk, however, of having this opinion appear superficial, we will not enter upon a review of these cases, because to do so would extend the opinion, as it seems to us, unnecessarily."

In *Ex parte Chetwood*, 165 U. S. 443, 41 L. Ed. 782, the court in holding that a receiver of a national bank appointed by the comptroller of the currency is not the officer of any court, but the agent and officer of the United States, used the following language:

"The receiver was appointed by the comptroller of the currency, January 4, 1889, and Chetwood commenced his suit July 19, 1890. The receiver was not the officer of any court, but the agent and officer of the United States, as ruled by Mr. Justice Gray, on circuit, in *Price v. Abbott*, 17 Fed. Rep. 506, and by Mr. Justice Jackson, then circuit judge, in *Armstrong v. Trautman*, 36 Fed. Rep. 276. And see *Porter v. Sabin*, 149 U. S. 473 (37, 815, 818); *Platt v. Beach*, 2 Ben. 303; *Frelinghuysen v. Baldwin*, 12 Fed. 395; *Armstrong v. Ethelsohn*, 36 Fed. Rep. 209.

"It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection because vesting that officer with

judicial power in violation of the Constitution that we have recently declined to re-examine that question. *Bushnell v. Leland*, 164 U. S. 684 (*ante* 244) . . . Our attention has been called to no case in which it has been held that the filing of such petitions by national bank receivers in the Federal courts operates to make the receiver an officer of the court or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court."

In *Gibson v. Peters*, 150 U. S. 342, 37 L. Ed. 1104, the court held that a receiver of a national bank being liquidated under the U. S. banking laws was an officer and agent of the United States.

In *United States v. Weitzel*, 246 U. S. 540, 62 L. Ed. 872, it was held that the receiver of a national bank appointed by the comptroller of currency to take possession of the assets of the bank and assume control of its affairs is not an "agent" of the bank.

In this case the receiver of the national bank appointed by the comptroller of currency was indicted in the District Court of the United States for the Eastern District of Kentucky for embezzlement in making false entries under Revised Statutes, Sec. 5209. "That section does not mention receivers, it provides that every president, director, cashier, teller, or agent of a national bank who commits these offenses shall be punished by imprisonment

for not less than five years nor more than ten years. The government contended that the receiver was an agent within the meaning of this act. A demurrer to the indictment was sustained on the ground that he is not."

Justice Brandeis, in writing the decisions of the court, used the following language:

"The receiver, unlike a president, director, cashier, or teller, is an officer, not of the corporation, but of the United States. *Re Chetwood*, 165 U. S. 443, 458; 41 L. Ed. 782, 787; 17 Sup. Ct. Rep. 385. As such he gives to the United States a bond for the faithful discharge of his duties; pays to the treasurer of the United States moneys collected; and makes to the comptroller reports of his acts and proceedings. Rev. Stat. § 5234. Being an officer of the United States he is represented in court by the United States attorney for the district, subject to the supervision of the solicitor of the treasury. Sec. 380 Comp. Stat. 1916 § 556; *Gibson v. Peters*, 150 U. S. 342, 37 L. Ed. 1104, 14 Sup. Ct. Rep. 134. And because he is such officer, a receiver has been permitted to sue in the Federal court regardless of citizenship or of the amount in controversy. *Price v. Abbott*, 17 Fed. 506. In a sense he acts on behalf of the bank. The appointment of a receiver does not dissolve the corporation (*Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 17, 40 L. Ed. 595, 597; 16 Sup. Ct. Rep. 439); the assets re-

main its property (*Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832); the receiver deals with the assets and protects them for whom it may concern, including the stockholders; and his own compensation and expenses are a charge upon them (§ 5238, Comp. Stat. 1916 § 9825). But a receiver is appointed only when the condition of the bank or its practices make intervention by the government necessary for the protection of noteholders or other creditors. While the receivership continues the corporation is precluded from (542) dealing by its officers or agents in any way with its assets. And when all creditors are satisfied or amply protected, the receiver may be discharged by returning the bank to the control of its stockholders, or by the appointment of a liquidating agent under Act of June 30, 1876, chap. 156 (19 Stat. at L. 63 Comp. Stat. 1916, § 9826). Whether, as the government assumes, such statutory agent who is elected by the stockholders is included under the term 'agent' as used in § 5209, we have no occasion to determine. The question was expressly left undecided in *Jewett v. United States*, 53 L. R. A. 568, 41 C. C. A. 88, 100 Fed. 832, 840. But the assumption, if correct, would not greatly aid its contention. The law can conceive of an agent appointed by a superior authority, but the term 'agent' is ordinarily used as implying appointment by a principal on whose behalf he acts. The fact that in this section the words

'clerk or agent' follow 'president', director, cashier, or teller' tends under the rule of *noscitur a sociis* to confirm the inference (*United States v. Salen*, 235 U. S. 237, 249; 59 L. Ed. 210, 213; 35 Sup. Ct. Rep. 51). Furthermore the term 'agent' of a 'bank' would ill describe the office of receiver."

" To the same effect are the following cases:

2 C. J. p. 420, § 4; Mechem, Agency, § 1, p. 1; *Todd v. United States*, 158 U. S. 282, 39 L. Ed. 982, 15 Sup. Ct. Rep. 889; *Jewett v. United States*, 53 L. R. A. 568, 41 C. C. A. 88, 100 Fed. 832; *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *State v. Hubbard*, 58 Kan. 797, 39 L. R. A. 860, 51 Pac. 290; *Witters v. Sowles*, 32 Fed. 762; High, Receivers, 3d ed., §§ 1 and 360; *Kennedy v. Gibson*, 8 Wall. 505, 19 L. Ed. 478; *Re Chetwood*, 165 U. S. 458, 41 L. Ed. 787, 17 Sup. Ct. Rep. 385; *Texas & P. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88, 20 S. W. 1135; *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 14 S. W. 214; *Brown v. Warner*, 78 Tex. 543, 11 L. R. A. 394, 22 Am. St. Rep. 67, 14 S. W. 1032; *Booth v. Clark*, 17 How. 328, 15 L. Ed. 166.

In *Witters v. Sowles, et al.*, 32 Fed. 762, the Circuit Court held that "the bank examiner was not an officer or agent of the bank and had no authority, as such, to act for the bank in any manner, and could not bind it by any act done or undertaken in its behalf."

HASKELL WAS AN OFFICER OF THE STATE OF WASHINGTON.

The Bank Commissioner and his deputy, in liquidating the bank, were not in any sense of the word acting as agents of the bank, but distinctly as officers of the State of Washington and in their official capacity as such. The purpose of the banking act of this state is to secure the liquidation of an insolvent bank through state officials, and the act itself provides that *no receiver shall be appointed for an insolvent bank* except temporarily and for a few days in an emergency. Haskill cannot then be considered a receiver of the bank in view of the fact that the Legislature has seen fit by its express declaration to prohibit any receiver from being appointed for the bank. There is certainly, then, a decided difference between the bank commissioner and a receiver.

The case of *U. S. v. Weitzel*, 246 U. S. 540, as above indicated, held that the receiver of a national bank was not an agent of the bank. Weitzel was thereupon indicted under a Federal statute for embezzlement of the bank's funds as an officer of the United States and convicted. In 274 Fed. 101, the conviction was sustained and it was held that in acting as receiver for the bank Weitzel was an officer of the United States.

In *Weitzel v. U. S.*, 274 Fed. 101, the Circuit Court of Appeals, Sixth Circuit, used the following language:

"Each indictment is criticised as fatally defective, because, as asserted, the receiver of an insolvent national bank, appointed by the comptroller of the currency, is not an officer of the United States and in its employment. We think this objection foreclosed by the decision of the Supreme Court in *United States v. Weitzel*, 246 U. S. 533, 38 Sup. Ct. 381, 62 L. Ed. 872, where, on review of an order dismissing a demurrer to an indictment charging this plaintiff in error, under section 5209 of the Revised Statutes (U. S. Comp. Stat. sec. 9772) with embazzlement and making false entires as an agent of the bank here in question, it was held (affirming the judgment of the District Court), that the receiver, unlike a president, director, cashier or teller, is an officer, not of the corporation, but of the United States. True, it was not necessary to an affirmance of the judgment below that the Supreme Court should affirmatively define the actual legal status of the receiver. It is enough that it unequivocally did so. That this was a considered conclusion is evidenced by the citation of several prior decisions of that court, holding the receiver of a national bank to be an officer of the United States."

In *Greenfield Savings Bank v. Commonwealth*, 97 N. E. 927, the Supreme Judicial Court of Massachusetts said:

"The bank commissioner, under the terms of the statute, took possession of all the 'property and busi-

ness' of the bank. This description includes the franchise, for a franchise is a legal estate and not a mere naked power vested in the corporation. *Society for Savs. v. Coite*, 6 Wall. 594-606, 18 L. Ed. 897. The bank had nothing left in its possession except the fragmentary privileges described in sections 13 and 14 of the act, to apply to the court and to call a meeting of the incorporators, and appoint agents for liquidation. There is left to it none of the franchise rights which were decisive in *Com. v. Barnstable Sav. Bank*, 126 Mass. 526. The bank commissioner took possession of the property and business of the petitioner, not as a receiver appointed by a court, but as a public officer, with many of the powers of a receiver and in most respects subject to the direction of the court to carry out a legislative policy for liquidation established as to savings banks whose depositors' interests are not being properly conserved. This policy does not necessarily contemplate a winding up of the corporate existence of every institution of which the bank commissioner may take possession . . . . But in general the policy established by the act is that of final liquidation. In carrying out this legislative policy the bank commissioner does not avail himself of the powers conferred by the act of incorporation, as does the receiver of a public service corporation or a private corporation authorized to continue the business, but acts entirely in pursuance

of the powers created by the statute. The bald existence of the corporation remains, but all its other substantial rights and privileges are in suspension."

In *Commonwealth v. Allen*, 133 N. E. 625, (Mass.) the court defined the status and power of the commissioner of banks as follows:

"The commissioner is an executive or administrative officer. He exercises visitorial powers, is charged with duties of rigid inspection, and, when circumstances exist enumerated in St. 1910, c. 399 par. 2 (G. L. C. 167, par. 22), may take and retain possession of the property and business of the bank for the purpose of liquidation of its affairs in accordance with the statute. He acts in all these particulars as a public officer, and not as a receiver appointed by the court. While he possesses some powers commonly conferred upon a receiver, and in many respects is subject to the direction of the court, he nevertheless carries out directly and in his own official capacity a legislative policy. His chart is the legislative mandate as declared in the statute. *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, 209; 97 N. E. 927)."

In *Bryan et al. v. Bullock*, 93 So. 182, the Supreme Court of Florida, in holding that the appointent by the state comptroller of a receiver to take charge of the assets and affairs of a state bank which has forfeited its rights and privileges in the comptroller's discretion, is not the appointment of a

receiver within the meaning of the law that makes the power of appointing a receiver a judicial function, said:

"The appointment of a receiver is a judicial function. But is the appointment by the comptroller of an agent, "receiver", to take charge of the assets and affairs of a state bank, which has forfeited its rights, privileges, and franchises in the comptroller's discretion, the appointment in fact of a receiver, within the meaning of the law that makes the power of appointing a receiver a judicial function? If that question is answered in the negative, then the argument of counsel for the plaintiff in error must fail.

"The business of banking is an occupation which bears such an intimate relation to the affairs of man that the proper supervision and control of its affairs and methods of transacting business, the discharge of its functions and obligations, is of great importance, to the end that the peace of the community, the welfare of the people, the orderly functioning of industrial activities, and the preservation of faith, and confidence, in commercial transactions be secured and maintained. A banking company's relation to the community is so intimate and its service of such far-reaching and comprehensive scope, that it has become a quasi public function, and almost, if not quite, classed as a public utility."

"The convenience and necessities of the people in their various activities are so dependent upon

sound banking operations and strict observance of sound banking principles that a violation by a banking corporation or association of rules and regulations which are deemed important to the orderly and safe administration of its affairs becomes a baleful influence in the community, tending to impair, if not destroy, the harmony of social and business intercourse. Such improper conduct on the part of a banking company becomes more than the violation of an individual or personal right. If it involved nothing more than the property loss of the officers and stockholders of the corporation, its transgression might be more lightly regarded; but such dereliction of duty involves much more than that. It tends to impair the credit and consequent efficiency in a commercial and industrial way of great numbers of people, who may be patrons and correspondents of the company. It tends to impair the facilities of commercial intercourse, for the time renders the earning of a livelihood more difficult, promotes distrust, and tends to destroy confidence which is so essential in all relations and so necessary to the peace of society."

"In view of these considerations the Legislature, in the exercise of its police power, has prescribed certain rules and regulations with which state banks shall comply as conditions upon which the transactions of such a business shall be carried on, and upon which management and control shall depend."

We call the court's attention to case of *Allen v. Prudential Trust Co.*, 136 N. E. 410, in which the Supreme Court of Massachusetts, in holding that a commissioner of banks in liquidating an insolvent trust company, is not acting as a receiver, but is carrying out a legislative policy, reviews in considerable detail the decisions of many of the states of the Union and of the Federal Court and points out the fact that these various courts have adopted the rule laid down by the Supreme Court of the United States.

In *Cosmopolitan Trust Co. v. Mitchell*, 136 N. E. 403 (Mass.), the court in holding that "the commissioner of banks, not being a receiver, but an executive or administrative officer, carrying out a legislative policy, was not required to secure permission of the court to bring the suit" and that said officer is not a receiver, and upholding the constitutionality of the Massachusetts banking act in reference thereto, based its decision in part upon the following language:

"The business of banking vitally concerns the public interests. Long established usage has given its sanction to legislative supervision and regulation to a greater or less extent of the conduct of banks. The prevention and redress of the evil and damage to individuals and to the public likely to arise from violation of their charters and of general laws and from insolvency of banks, have received the attention of the General Court at least since the enact-

ment of St. 1838 c. 14. It is of vast importance to the commercial prosperity, the manufacturing activity and the industrial welfare of the community that banks be managed with integrity and sagacity and according to the rules of law prescribed for their administration. The savings of the poor, the earnings of the thrifty and the resources of the wealthy alike depend upon the prevention of delinquency on the part of those who control and direct the affairs of banks. Checks drawn against deposits in banks have come to replace to so great an extent the use of currency and coin in the ordinary transactions of life that whatever rationally conserves their security is in the common interest. Reason and authority agree that the police power rightly may be exerted within rational limits to regulate and protect the safety of banking. *Commonwealth v. Farmers and Mechanics' Bank*, 21 Pick. 542, 32 Am. Dec. 290; *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; *Id.*, 219 U. S. 575, 31 Sup. Ct. 209, 55 L. Ed. 341."

THERE WAS NO INTENTION OF THE BANK COMMISSIONER TO PAY THE MORTGAGE AND DISCHARGE THE LIEN THEREOF.

It is decidedly contrary to the testimony in this case to hold that it was the intention of the bank commissioner or his deputy to pay this mortgage and discharge the indebtedness secured thereby. If

he intended to do so, why did he take an assignment thereof? The question of intention in such a transaction is controlling, and such intention may not only be established by the evidence, but may be collected from the circumstances of the transaction, and when these furnish no evidence of intent from the interests of the parties.

It was, however, argued that a court of equity would presume such an intention, and the reasons assigned were based upon the equitable doctrine of merger. We are unwilling to concede that the doctrine of merger has any application to the facts in issue, but will nevertheless discuss the case from that point of view. We believe it will be conceded that the doctrine of merger was intended by equity to work justice, and equity will not declare a merger where such is contrary to the intentions of the parties, or where injustice would result therefrom. It is also essential that the legal and equitable title should unite in the same person in the same right. Therefore, before the doctrine of merger can have any application to this cause it must be legally determined that the bank commissioner is the representative of the bank, rather than a state officer. We submit, however, that the statutes of the State of Washington, the cases cited and the arguments based thereon will satisfy the court that such a determination can not be arrived at.

We call the court's attention to the following authorities on the question of intention being the controlling factor in this transaction:

21 Corpus Juris, 1034-5;
11 Corpus Juris, 689;
10 R. C. L., 666-7;
Factors and Traders' Ins. Co. v. Murphy et al., 111 U. S. 738, 28 L. Ed. 582;
U. S. v. Stowell et al., 133 U. S. 1, 33 L. Ed. 555;
Beecher v. Thompson, 20 Wash. Dec. 324, 207 Pac. 1056;
Connecticut Inv. Co. v. Demick, 105 Wash. 265, 177 Pac. 676;
Hitchcock v. Nixon, 16 Wash. 281, 47 Pac. 412;
Stuart v. Eaton, 20 Wash. 378, 55 Pac. 314;
Chase National Bank v. Hastings, 20 Wash. 433, 55 Pac. 574;
Nommeson v. Angle, 17 Wash. 394, 49 Pac. 484;
Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147;
Chase National Bank v. Security Sav. Bank, 28 Wash. 150, 68 Pac. 494;
Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501;
Bunner v. Pruitt, 73 Wash. 569, 132 Pac. 237;
McCreary v. Coggeshall, 74 S. Car. 42, 7 A. & E. Ann. Cas. 692 and extensive note.
Pugh v. Sample, 49 So. 526, 39 L. R. A. (N. S.) 834 and note;
Gainey v. Anderson, 68 S. E. 888, 31 L. R. A. (N. S.) 323 and note.
Heath v. Wheeler, 34 N. E. 174;

Boos v. Morgan, 30 N. E. 141;
Bolles v. Beach, 53 Am. Dec. 263.

In 21 C. J. 134, the rule is laid down as follows:

"In equity, the rules of law as to merger are not followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purpose of justice and the actual and just intent of the parties, whether expressed or implied. The doctrine of merger has its foundation in the convenience of the parties interested, and therefore whenever the rights of strangers, not parties to the act, that would otherwise work in extinguishment of the particular estate, require it, the two estates will still be considered as having a separate continuance. Whenever a merger would operate inequitably it will be prevented.

"The controlling consideration is the intention, expressed or implied, of the person in whom the estates unit, provided the intention is just and fair, and a merger will not be permitted contrary to such intent. Where there is no expression of intention it will be sought for in all the circumstances of the transaction, and may be gathered not only from the acts and declarations of the owner of the several and independent rights, but from a view of the situation as affecting his interests, at least prior to the presence of some right in a third person. And equity will presume such an intent as is consistent with the best interests of the parties; and the same

presumption is indulged where the party is an infant, or person of unsound mind. The intent of the party does not become fixed and unchangeable until some one acquires an interest in the property, and thereby a right to draw such intent in question."

"The intention that the mortgage lien shall be extinguished will not be presumed where the interest of the purchaser of the mortgage and the mortgaged property requires that the mortgage shall remain in force, as where the result of merger would be to give priority to intervening liens."

11 C. J. 689;
Waterloo First Nat'l Bank v. Elmore, 3 N. W. 547;
Christy v. Scott, 31 Mo. A. 331-6.

In *Factors and Traders' Ins. Co. v. Murphy, supra*, the Supreme Court of the United States held that merger would not be permitted in the absence of the intention of the parties, or if, in the absence of any intention, such merger was against his manifest interest, using the following language:

"It was not, therefore, intended to extinguish their liens by this proceeding, but to keep them alive until the property should finally be sold and the money divided. So it is equally clear that it was not for the interest of these lien holders, who were actually purchasing, to extinguish their liens and thereby make Mrs. Murphy's notes a first lien, and enable her to get all her money at their expense.

"The rule on this subject is thus stated by Jones on Mortgages, sec. 848: 'It is a general rule that when the legal title becomes united with the equitable, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping these titles distinct, or if there be an intervening right between the mortgage and the equity, there is no merger.' And in the case of *Forbs v. Moffatt*, 18 Ves. 384, Sir William Grant says: 'The question is always upon the intentions, actual or presumed, of the person in whom the interests are united.' Other authorities cited by Mr. Jones sustain the principle. *Clark v. Clark*, 56 N. H. 105, is directly in point. *Loud v. Lane*, 8 Met. 517; *Armstrong v. McAlpin*, 18 Ohio St. 184."

We quote at considerable length from the case of *Beecher v. Thompson, supra*, for the reason that the opinion is not yet printed in the bound volumes of the Supreme Court decisions of the State of Washington:

"This brings up the question as to whether there has been a merger of the legal title and the interest of the mortgagee, so that the respondent is entitled to the foreclosure of his lien. The chattel mortgage given before the furnishing of labor and material upon the chattel is superior to the lien for such labor and materials. *Rothweiler v. Winton Motor Car Co.*, 92 Wash 215, 158 Pac. 737. Therefore the appellants' mortgage gave them a right

superior to the respondent's lien. The question is whether the subsequent acquiring of title by assignment of the legal title resulted in a merger which could give preference to the respondent's lien over the appellants' title. The general rule is that the passing of the interest of both mortgagor and mortgagee into the same person does not result in a discharge of the mortgage on the theory of a merger, unless it was so intended by the parties. As stated in 11 C. J. 689:

"The assignment of the interests of both mortgagor and mortgagee to the same person will not operate to discharge the mortgage on the doctrine of merger, unless the parties so intend it. A fortiori after the mortgagee has parted with his interest, an assignment of the equity of redemption to him does not extinguish the mortgage. The intention that the mortgage lien shall be extinguished will not be presumed where the interest of the purchaser of the mortgage and the mortgaged property requires that the mortgage shall remain in force, as where the result of merger would be to give priority to intervening liens, and a transfer of the mortgaged property to the holder of the mortgage, expressly subject to the mortgage debt, evidences an intention that no merger shall be effected."

"This court has followed that rule in several decisions: *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Nommenson v. Angle*, 17 Wash. 394, 49 Pac. 484; *Stewart v. Eaton*, 20 Wash. 378, 55 Pac. 314;

Chase Nat. Bank of N. Y. v. Hastings, 20 Wash. 433, 55 Pac. 574; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506; *Connecticut Investment Co. v. Demick*, 105 Wash. 265, 177 Pac. 676.

" The rule is stated as follows in the note to 39 L. R. A. (N. S.) 834 (*Pugh v. Sample*, 123 La. 791, 49 South 526):

". . . the lesser estate in land will merge in the greater whenever the two estate are owned by the same person. This rule, however, does not apply where such merger would be inimical to the interests of the owner, hence, unless an intention to merge with knowledge of a junior lien or liens clearly appears, no merger results from the acquirement by the holder of the senior mortgage of the interests of the mortgagor, and the senior mortgage retains its priority as against all junior or intervening liens upon the mortgaged property;"

" There is nothing in this case to indicate any intention to merge the legal title and the interest of the mortgagee so that the priority which the appellants held over the respondent's lien would be lost. Equity will not hold transactions such as is revealed by the findings of fact here to be a merger when the natural conclusion from those facts must be, without any other evidence of the intention of the parties, that the mortgagee did not intend to have a merger result, it being more beneficial to him to maintain his interest under his prior mort-

gage, and there being no intention manifested to make the intervening lien superior to his prior rights or accept and pay such lien. As was said in *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433:

"The view generally held is that merger is not favored in the courts of law or equity; and in equity at least it will not take place if opposed to the intention of the parties either actually proved or implied from the fact that merger would be against the interest of the party in whom the several estates or interests have united. This dictrine is sustained by an unbroken current of authority in the other states of the Union and in England."

"There is nothing in the circumstances surrounding this case which show other than an intention on the part of the appellants to hold their rights under the mortgage. Mere silence is not sufficient, the presumption being against the merger where it is to the interest of the mortgagee that there should not be one, the taking of the legal title not being sufficient of itself to overcome that presumption."

"We do not think that under the almost universal authority this proposition can be questioned. It was evidently to Nixon's interest that there should not be a merger; and that being true, a court of equity would not compel the merger."

Hitchcock v. Nixon, 16 Wash. 281, at p. 286.

"The general rule that a merger will be decreed or not, according to the intention of the parties at

the time of the transaction, and, it must be presumed that it is not the intention of the owner in equity to lose that right because the legal fee passes to him, we must conclude that in this case there is nothing to indicate the intention of Stubblefield to allow his equitable title to be merged in the legal title."

Stewart v. Eaton, 20 Wash. 378 at p. 382.

"We think the rule is quite well settled that, wherever it is more beneficial to the person taking the fee that the mortgage upon it should stand, that circumstance should control in determining the question of intention, and equity will give effect to it by preventing merger and treating the mortgage as a subsisting charge."

Chase National Bank v. Hastings, 20 Wash. 433 at p. 436.

"Where a first mortgagee has released his mortgage of record, surrendered his note to the mortgagor and taken a deed to the property, under the mistaken belief that there were no other encumbrances on the premises, while in fact there was a second mortgage thereon, the first mortgagee is entitled as against the debtor and the second mortgagee, or the assignee of the latter with notice, to be restored to his original rights and lien on the premises by a court of equity."

(Syllabus) *Nomienson v. Angle*, 17 Wash. 394.

"The law is well settled that there is no merger of the mortgage, when the mortgagor conveys to the mortgagee, as against subsequent incumbrances (lien claimants), where it would be inequitable, or where the intention of the parties was otherwise."

Fitch v. Applegate, 24 Wash. 25 at p. 34.

"A merger of the legal and equitable title does not follow from the conveyance of mortgaged premises to the mortgagee, either where there are outstanding intervening interests or when it is the intention of the parties that no merger shall be accomplished by the transfer."

Chase National Bank v. Security Sav. Bank, 28 Wash. 150.

"Where a conveyance of mortgaged premises was made to the mortgagee in satisfaction of the mortgage debt, who took same in ignorance of a subsequent judgment lien thereon, and cancelled the mortgage of record, equity will not treat the conveyance as a merger of the mortgage lien in the absolute estate, but will revive such lien as against a purchaser on execution sale."

Woodhurst v. Cramer, 29 Wash. 40.

We cite the case of *McCreary v. Coggeshall, supra*, as reported in 7 A. & E. Ann. Cas. 693, which contains an elaborate discussion of the rule that is quoted by the Supreme Court of Washington in *Beecher v. Thompson, supra*: "Merger is not favored in the courts of law or equity and, in equity at least,

will not take place if opposed to the intentions of the parties, either actually proven or implied, from the fact that merger would be against the interest of the party in whom the several estates or interests have united. This doctrine is sustained by an unbroken current of authority in other states of the Union and England." The case is accompanied by an extensive note upon this subject.

An extensive case note upon this same subject is found in *Pugh v. Sample, supra*, 39 L. R. A. (NS) 834.

We again call the court's attention to the fact that the bank was under no obligation to pay this mortgage, and the rule is that "when no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties, and their respective interests, and that subject will have a strong bearing upon the question of such intent."

> *Strong v. Converse*, 85 Am. Dec. 732;
> 3 Devlin Real Estate, Sec. 1345.

THE BANK COMMISSIONER WAS UNDER NO LEGAL OBLIGATIONS TO SATISFY THIS MORTGAGE AND PAY THE DEBT, AND HE COULD NOT LEGALLY DO SO.

The bank commissioner was under no obligations to pay this mortgage and it was not an enforcible obligation against the bank. The evidence is con-

clusive to the effect that the deed given by the bank to the building company was given without any consideration, in view of the fact that the building company failed to live up to the terms of the contract pursuant to which title was passed by the bank to it. Further, there was an instrument of record introduced as an exhibit in this case, wherein it was agreed that the bank could not be held for the mortgage debt, but only the premises were security for the debt. This mortgage became due in September, 1920, several months after the deed was passed to the building company. No claim was presented to the commissioner for payment of this debt as required by the banking laws of this state, and every claim based thereon was barred by the statute. If an action had been commenced to foreclose this mortgage no money judgment could be recovered against the bank.

The bank commissioner was under the positive duty of administering the funds of the bank for the benefit of all creditors of the bank, and was without right or authority to pay off this mortgage, which would result to the benefit of the creditors of the building company and to the detriment of the creditors of the bank. He was not appointed for the purpose of acting for the building company, but for the purpose of liquidating the affairs of the bank.

A court of equity cannot then presume, notwithstanding the intention of the bank commissioner,

that he was discharging the obligation for the benefit of the creditors of the building company, and to the detriment of the creditors of the bank. A court of equity will not permit such an act, and subsequent lien claimants can not question the validity of the mortgage in the hands of the bank commissioner.

American Trust etc. Bank v. McGettigan, 52 N. E. 793;
Wimpfheimer v. Perrine, 50 Atl. 356;
Lawson v. Warren, 124 Pac. 46;
Cronenwett v. Boston & A. Transp. Co., 95 Fed. 52;
Adams v. Collier, 122 U. S. 382, 30 L. Ed. 1207;
Warren v. Moody, 122 U. S. 132, 30 L. Ed. 1108;
Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075;
Yeatman v. Savings Institution, 95 U. S. 764;
Marion Trust Co. v. Blish, 85 N. E. 344.

Let us concede, for argument only, that the bank, under the covenants of the deed, was obliged to pay this $70,000 mortgage, had it remained solvent, despite the record release from personal liability, in so far as the rights of intervening innocent third parties are concerned, yet, upon its insolvency, its liability would only extend to the deficiency judgment upon foreclosure, and as to that liability it

would be the same as to other general creditors. This being the case it would not have been the intent of the Bank Supervisor, in taking this assignment, acting as an agent or officer of the State of Washington and, as such, having charge of the funds of the bank, to pay off this mortgage and thereby give a preference. Had he so intended, the law would not uphold him, and both in law and in equity he would be held to hold such mortgage in his official capacity for the benefit of the trust fund, or equably for all creditors. All the essential elements upon which a merger or extinguishment of the mortgage debt could be predicated are, in this assignment, wholly lacking. The doctrine that whatever transposition of the trust fund may be made by the trustee, the resultant estate vests in the *cestui que trustant* is too elementary to require citation.

The Bank Supervisor, being under no obligation, legal or equitable, to discharge this mortgage debt, his act in using the trust funds for that purpose simply transported the moneys of the funds into the security created by the mortgage and, as such, by means of the assignment, the mortgage became a part of that fund.

In the case at bar the trust fund was used to purchase a note and mortgage and, if not designedly for the interest of all the creditors, it would be a travesty upon the trust fund doctrine to allow it to result otherwise. That a receiver, by design or

otherwise, in dealing with trust funds, might so manipulate them as to redound in greater benefit to one class of creditors as against another, would do such violence to the doctrine that we fail to see how such a proposition can be entertained.

> *Wimpfheimer v. Perrine*, 50 Atl. 356;
> *Am. Trust & Sav. Bank v. McGettigan*, 52 N. E. 793 (Ind.).

The purchase of these notes and mortgage with the creditors' funds, while it may not have been warranted in the exercise of extreme prudence, yet by no precedent can it be held otherwise than in the equal interest of all the creditors, as if a like note and mortgage, a strange instrument to the parties, had been so purchased by the Supervisor.

The rule that when a receiver or trustee purchases property with trust funds, taking the same in his own name and not as receiver, he is held to hold the same in trust for the benefit of those entitled to share in the trust fund, is too well established to require citation. It simply creates a resulting trust.

But counsel for the lien claimants argues, and the court held, that when the bank conveyed title to its property to the building company by warranty deed, the bank thereby became legally obligated to pay the Penn Mutual mortgage, that being an outstanding lien against the title at that time and a breach of the warranty. While we do not agree

with this proposition, if we should assume that this is all correct, and that it was a legal obligation of the bank's for which a claim could have been presented to the Supervisor, this obligation was to the building company, and the Supervisor would have neither the right nor the authority to pay this debt in full to the prejudice of the other creditors of the bank. There is no pretense that this was paid as a dividend, or that there was any intention to extinguish the lien of the mortgage, and the very fact that an assignment of the mortgage was taken rather than a release of it evidences this intention. If this contention is correct in law, then a court of equity would of necessity, in order to prevent an unlawful preference, have to hold that the Supervisor, as representing *all* of the creditors of the bank — the building company included — would have the right to foreclose this mortgage for the benefit of all of the creditors of the bank, and became subrogated to the rights of the Penn Mutual for the benefit of all of the creditors of the bank, the building company included, and that the remedy of the lien claimants would be through the building company as a creditor of the bank.

Tardy's Smith on Receivers, Sec. 110.

"A receiver must act impartially for the best interest of all creditors and he cannot take a course, as, for instance, suing to have a mortgage cancelled that will inure to the benefit of some and to the detriment of others."

Smith on Receivers, Sec. 110.

In *American Trust and Savings Bank v. McGettigan, supra,* the court held that a receiver cannot sue to cancel a mortgage given by a corporation where by so doing part of the creditors would be benefited and part of the creditors injured. "A receiver while acting for a court of conscience must act impartially and may not sequester the security of one creditor for the benefit of others who have no equity. The only persons, if any, injured by the alleged fraud were the subsequent creditors without notice, and the receiver cannot maintain an action that shows upon the face of it that the relief sought will place the creditors having an equity in a worse condition, and the creditors having no equity in a better condition, than they occupied before his appointment."

The Supervisor of Banking was under no obligation to pay this mortgage; it was not the obligation of the bank, there was an express written agreement to the effect that the bank should not be liable upon the debt. Prior to the failure of the bank the building company was never in a position to claim damages by reason of the breach of any warranty in the deed from the bank to the building company, because of the fact that the building company was itself in default, it never having delivered the second mortgage bonds which it had agreed to deliver in payment for the property, and subsequent to the failure the building company was not in position to claim any of the assets in the hands of the Super-

visor of Banking by reason of any such breach. The undisputed evidence is that the building company was largely indebted to the bank at all times. The lien claimants in this case stand in the shoes of the building company and can have no greater rights or equities than the building company had.

THE BANK, ACTING IN ITS OWN BEHALF, AFTER THE BUILDING COMPANY HAD BREACHED ITS CONTRACT, PURSUANT TO WHICH IT OBTAINED TITLE TO THE LOTS, COULD HAVE PURCHASED SAID $70,000.00 MORTGAGE IF NECESSARY TO PROTECT ITS INTEREST IN SAID LOTS UNDER THE CONTRACT.

The bank commissioner was not acting as an agent of the bank in purchasing the mortgage, but was merely acting so as to protect the bank's equity in the lots deeded to the building company, and for which it had received no payment.

And the bank itself was not expected to pay this mortgage, which was to be paid by the building company out of the $600,000.00. Mr. Larson testified to that effect at page 544 of the transcript of testimony:

"Q. Mr. Larson, when the $600,000.00 was arranged for, was it your intention so everybody understood, that it would take up the $70,000.00 Penn Mutual mortgage?

"A. Oh, yes."

We have heretofore called the court's attention to the fact that the building company had defaulted in its contract. The bank had permitted a six-story building to be torn down from the lots in question upon the express condition that a $600,000.00 mortgage should be placed upon said premises by the building company, and that it be given $350,000.00 worth of bonds by June, 1920, secured by a second mortgage on said premises. After the four months' period had lapsed during which this was to have been accomplished, the bank had a clear right to protect its equity in this property and if necessary to purchase the $70,000.00 mortgage, which did not become due and payable until September, 1920, to protect its equity in the premises.

No citation of authorities is necessary to sustain this statement. We are, however, contending that the bank commissioner was not acting as an agent for the bank in this transaction, and that this mortgage is a valid and enforcible mortgage in the hands of the Supervisor of Banking, for he does not stand in the shoes of the bank, nor does he represent either the bank or its stockholders. In this respect the supervisor differs materially from a receiver, he is not appointed by the court.

THE LIEN CLAIMANTS COULD NOT THEMSELVES HAVE COMPELLED THE BANK TO PAY OFF SAID MORTGAGE EXCEPT UPON THE EXPRESS CONDITIONS THAT THE EQUITIES OF THE BANK WOULD BE PROTECTED.

The contractors, laborers and materialmen were all inferior to the lien of this mortgage as long as it was in the hands of the insurance company, and it was in its hands until after the time when they had a legal right of lien against the premises, and even after this action had been instituted. The bank's equities under and by virtue of the purchase contract of the lots in controversy by the building company could have been successfully asserted against any demand of the building company or its lien claimants. The lien claimants would have been permitted to compel the bank to satisfy the mortgage, only upon the express condition that the bank's equity in the lots be preserved. They can assert no greater interest than the building company could assert, and they can demand or occupy no better position with reference to this mortgage than could the building company acting in its own behalf.

Adams v. Collier, 122 U. S. 382;
Warren v. Moody, 122 U. S. 132.

IF THE BANK ITSELF HAD PAID THIS $70,-000.00 MORTGAGE IT WOULD HAVE BEEN SUBROGATED TO ALL RIGHTS UNDER SAID MORTGAGE, AND IF NECESSARY FORECLOSE SAID MORTGAGE FOR ITS PROTECTION.

We have heretofore set forth the facts with reference to the contract existing between the bank and the building company, and have pointed out, and will hereafter point out, the reasons why the bank, upon the breach of the contract by the building company, was entitled to protect itself under the $70,000.00 mortgage as well as under the $600,-000.00 mortgage. We cite the following authorities to sustain our contention:

2 Jones on Mortgages, Sec. 768, p. 214;
North End Savings Bank v. Snow et al., 83 N. E. 1099 (Mass.);
Pratt v. Buckley, 55 N. E. 889;
Gerdine v. Menage, 43 N. W. 91 (Minn.);
Bowles v. Beach, 53 Am. Dec. 263;
In re May, 67 Atl. 120 (Penn.);
Divine v. Mortgage Co., 48 S. W. 585;
Furmas v. Durgin, 119 Mass. 500, 20 Am. Rep. 241;
Williams v. Moody, 22 S. E. 30 (Ga.);
Haas v. Dudley, 48 Pac. 168 (Ore.);
Strohauer v. Voltz, 4 N. W. 161 (Mich.).

2 Jones on Mortgages, Sec. 768, lays down the rule as follows:

"If a purchaser who has assumed a mortgage debt omits to pay it when due, the grantor may take an assignment of the mortgage to himself, foreclose the same, and sue for the deficiency, or sue on the agreement, and recover the amount paid by him in obtaining the mortgage, not exceeding the amount unpaid on such mortgage." Also, "and so a mortgagor, who has sold subject to the mortgage debt, upon being compelled to pay it, is subrogated to the benefit of the security, without any formal assignment of it to him. He thereby becomes an equitable assignee of it and may enforce it against the property." Citing among other cases,

Risk v. Hoffman, 69 Ind. 137;
Kinnear v. Lowell, 34 Maine 299;
Gerdine v. Menage, 41 Minn. 472, 43 N. W. 91.

In *North End Savings Bank v. Snow*, 83 N. E. 1099, the Supreme Court of Massachusetts held that if a mortgagor conveys his equity in mortgaged property to one who assumes the mortgage and that person fails to pay the mortgage, the mortgagor by paying said mortgage does not by so doing discharge and extinguish the debt and mortgage unless so intended, citing cases to support their decision. ;

In *Pratt v. Buckley*, 55 N. E. 889, the same court held that "The owner of mortgaged lands, selling subject to the mortgage, . . . may take an assignment of the mortgage, and foreclose to

protect herself, and such assignment does not operate as a discharge of mortgage."

In *Gerdine v. Menage*, 43 N. W. 91, the Supreme Court of Minnesota held that after the mortgagor has deeded land incumbranced by the mortgage, which was to be paid by the grantee, if said mortgage is not paid the mortgagor has the same right as any third person to purchase and take an assignment of the mortgage and would be entitled to be subrogated to his right with respect to the land.

In *Bowles v. Beach*, 53 Am. Dec. 263, it was held that the grantor was not estopped by covenants against incumbrances from showing that the deed was really passed subject to incumbrances by verbal agreement, as part of the consideration for passing the deed; and that if the grantee fails to pay the mortgage he has agreed to pay as part of the consideration for the deed, and the mortgagor discharges the mortgage, he is damnified to the extent of the failure by the grantee to discharge the mortgage.

THE EQUITIES OF THE LIEN CLAIMANTS WERE IN NO MANNER ALTERED BY THE TRANSACTION BECAUSE THE MORTGAGE WAS AT ALL TIMES PRIOR TO SAID LIENS.

The argument under this sub-heading has been referred to heretofore. This was a valid and binding mortgage upon the premises at the time the lien

claimants acquired a lien upon the property covered by said mortgage. The fact that a different party purchased said mortgage after the institution of this suit, in no wise prejudiced the lien claimants, but they were left in exactly the same condition they were in when it was held by the Penn Mutual Insurance Company; and by continuing the mortgage in full force and effect the lien claimants were not placed in a worse position than occupied by them when the mortgage was held by the insurance company.

Bormann v. Hatfield, 96 Wash. 270 at p. 274;
Griffin v. International Trust Co., 161 Fed. 48;
In Re Silver, 208 Fed. 797.

In *Bormann v. Hatfield et al.*, 96 Wash. 270, the court held that where a first mortgage is released and a new one taken as a substitute, upon the false representations of the mortgagor that there are no intervening liens, and in ignorance of a second mortgage duly recorded, equity will, in the absence of laches, restore the lien of the first mortgage and give it priority where the holder of a second mortgage is not thereby prejudiced, saying:

"We are of the opinion that the rule, supported both by reason and by authority, is to the effect that, when the holder of a first mortgage takes a new mortgage as a substitute therefor and releases the original mortgage, in ignorance of an intervening lien upon the mortgaged premises, and especial-

ly if the release is induced by fraud or misrepresentation on the part of the mortgagor, equity will, in the absence of laches or other disqualifying fact, restore and reinstate the lien of the first mortgage and give it its original priority. The rule is, of course, subject to the limitation or qualification that by restoring the discharged lien the holder of the junior incumbrance must not be placed in a worse position than he would have occupied had the senior incumbrance not been released. To deny this relief and to refuse to restore for the protection of the first mortgagee the lien of the prior mortgage would be to permit the second mortgagee to unjustly profit by the mistake of the former, or to unconsciously avail himself of the fruits of a palpable fraud perpetrated by another to the injury of the victim of the fraud. *Therefore, a subsequent mortgagee, who becomes such anterior to the discharge of a prior mortgage, cannot, with any show of reason or justice, claim to be injured by the setting aside of the subsequent release and restoring the lien of the prior mortgage. He is in no way prejudiced, but is left to enjoy exactly what he expected to get when he accepted the second mortgage. Gieb v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Bruse v. Nelson*, 35 Iowa 157; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Robinson v. Sampson*, 23 Me. 388; *Cobb v. Dyer*, 69 Ms. 494; *London & N. W. American Mtg. Co. v. Tracey*, 58 Minn. 201, 59 N. W. 1001; *American Bonding Co. v. National Mechanics' Bank*, 97 Md. 598, 55 Atl. 395, 99 Am. St. 466, note."

This court in the case of *Griffin v. International Trust Co.*, 161 Fed. 48, 88 C. C. A. 212, laid down the rule as adopted by the Supreme Court of Washington in the above case and has forcibly presented the reason for the adoption of this rule, citing authorities in support thereof.

It would be inequitable to declare this mortgage extinguished. The contractors, laborers and materialmen were all inferior to the lien of this mortgage as long as it was in the hands of the insurance company, which was until their debts had all matured, their liens had been filed and this action instituted, and their position has not been changed one particle to their detriment by the assignment.

EACH LIEN CLAIM IS A SEPARATE CONTROVERSY AND MUST STAND UPON ITS OWN MERITS.

The court's attention is called to the decisions of the Supreme Court of the State of Washington to the effect that each claim must stand or fall upon its own merits. Some of the lien claimants are absolutely without right or authority to object to this $70,000.00 mortgage, and particularly is the McClintic-Marshall Company foreclosed from so doing because of the fact that they entered into their contract when the title to the property was held by the bank. In several other instances no claims or representations as to title, mortgages or money were

made at the time the contracts were entered into, or at any time subsequent thereto. None of the lien claimants testified that they knew anything at all as to the title of the property at any time prior to January 15th, 1921.

We call the court's attention to the fact that because the $70,000.00 mortgage was of record, it was the duty of all parties intending to rely upon the security of the property to make investigations for the purpose of ascertaining the true facts with reference to the mortgage. We quote the following from 3 Devlin on Real Estate, Sec. 1342:

"RELIANCE UPON RECORD." — As has been explained, the question of merger is one determined in a great measure by the intention of the parties. Reliance cannot be placed upon the record for the purpose of showing merger. A party who takes a deed upon the assumption that there has been a merger of a former mortgage to his grantor, in a subsequent conveyance of the land, acts at his own peril. He has notice that some one holds the mortgage as an existing lien, and, unless the mortgagee is still the owner of the mortgage, the grantee takes subject to it. In a case in Wisconsin the court considered the question of merger, quoting with approval the language of the Master of the Rolls, Sir William Grant, that the question is 'upon the intention, actual or presumed, of the person in whom the interests are united', and adds: 'Such being the law, it seems very clear that it was the duty of the

trustees, if they desired that the trust deed should be unaffected by the plaintiff's mortgage, to go beyond the record in the register's office (for such record was notice to them of the mortgage), and to ascertain from other sources whether there had been a merger in fact. They should have required their grantor (if they could), to produce the mortgage and the note which it was given to secure, and to deliver them up or, at least, to produce the securities and discharge the mortgage of record. The inability of the grantor to do so would be sufficient to charge the trustees with notice that the security had been assigned, and the failure to call upon the grantee to do so is sufficient to charge them with laches. Briefly stated, the case seems to be this: When the trust deed was executed, under which the appellant makes its title to the land in controversy, the plaintiff's mortgage was of record in the proper office, and the trustees had, at least, constructive notice of its existence. There was nothing of record to show that the debt which it was given to secure had been paid, and nothing which could affect the mortgage, except the registry of the conveyance to the mortgagee of the equity of redemption. The record did not show whether such conveyance operated as a merger of the mortgage interest in the land or otherwise. Further investigation was necessary to determine that fact, and the means of determining it were at hand. The trustees failed to push their inquiries beyond the registry. They failed to ascer-

tain (as they easily might have done,) whether the two estates were, in fact, united in their grantor and, if so, whether the latter elected to preserve the mortgage interest. Using no diligence in that behalf, they took their conveyance at their peril of the fact. It turns out that there has been no merger; that the mortgage interest is still subsisting, and because of priority of execution, and registry, such interest is paramount to that of the appellant in the mortgaged premises.' If a mortgagee assigns the mortgage, and if subsequently the mortgagor conveys the mortgaged estate to the mortgagee, the assignee of the mortgage has a valid lien on the property as against a person purchasing from such mortgagee, without knowledge of the assignment. The fact that, prior to the registration of the assignment, the conveyances to the mortgagee, and from him to the purchaser, were both placed on record cannot alter this rule. The records can only show what was done. They cannot show what the parties intended when not expressed. The assignee stands in the place occupied by the mortgagee at the time of the assignment. If the mortgage was a valid lien at that time, it does not lose its validity because subsequently the mortgager conveys the property to the mortgagee. A purchaser cannot assume without inquiry that the mortgage was satisfied."

Miller v. Fryberg et al., 119 Wash. 243, 205 Pac. 388, is particularly called to the court's attention, and we quote at length the following:

"Fryberg and wife, being the owners of the real estate involved herein, in King county, Washington, and desiring to construct a dwelling house thereon, made, executed and delivered to W. J. Byrne their note for $2,300, payable five years after date, and a first mortgage upon the real estate, maturing five years after date, which instruments were dated February 27, 1920. In consideration of the note and mortgage securing the same, Byrne gave Frybergs no money, but agreed to construct the dwelling, and from the money represented by the note and mortgage pay for all labor and material furnished and used in the construction of the house.

" The mortgage was recorded in the office of the auditor of King county on March 10, 1920. Prior thereto, Byrne had entered into an agreement with the McGillvray Building Company, one of the defendants herein, for the construction of the dwelling house and it proceeded with the construction, but had done nothing prior to the recording of the mortgage. On March 8, 1920, Byrne assigned the note and mortgage given him by Fryberg and wife to respondent, American Savings Bank and Trust Company, a banking corporation, together with other notes and a mortgage received by Byrne from another, receiving the full amount of this mortgage in consideration of the assignment of the notes and mortgages. The bank failed to record its assignment of the mortgage until *December* 2, 1920. The McGillvray Building Company, after it proceeded

with the construction of the dwelling house, purchased lumber to be used therein from appellant Farrell Lumber Company about March 24, 1920, and which lumber was used in the construction of the building.

The Farrell Lumber Company investigated the title to the property prior to commencing to furnish the materials and discovered the mortgage from Fryberg and wife to Byrne of record, and thereupon refused to furnish lumber to be used in the construction of the building. Thereupon Byrne went to the office of the lumber company and stated that he held the mortgage upon the premises; that the mortgage was given for the purpose of securing funds to construct a dwelling house thereon, and that he had advanced no money to the Frybergs, but intended to use the fund represented by the note and mortgage to pay claims for labor and materials; and to that effect, on March 25, 1920, Byrne addressed and delivered a letter to the Farrell Lumber Company in which he stated that he had made a building loan upon the Fryberg property, describing it, and that he would be pleased to deduct and pay to the Farrell Lumber Company, out of the first mortgage, the amount of its bill, stating that the lot was clear and his mortgage was put thereon for the purpose of advancing money to build, and that he owned the mortgage. Upon receipt of this letter, and on March 26, 1920, the lumber company proceeded with the delivery of the lumber required to

be used in the construction of the building, and ceased to furnish material on June 26, 1920, having furnished a total of the value of $1,446.95, upon which Byrne had paid the sum of $500, and after deducting certain credits, the lumber company's claim amounted to $821.90.

"It is the contention of appellants that, by failing to file its assignment, which would have given notice to materialmen and mechanics that it had acquired Byrne's interest in the Fryberg note and mortgage, the bank permitted Byrne to record the mortgage and defraud the lien claimants by dealing with them as the owner of the mortgage, and that the bank lost its priority as against the subsequent lien claimants by reason of Sec. 8781 Rem. Code (P. C. Sec. 1914). That section is as follows:

"All deeds, mortgages and assignments of mortgagees shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world."

" We held in *McDonald & Co. v. Johns*, 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57, that the above statute should be considered to mean *bona fide* mortgagors or incumbrancers as well as *bona fide* purchasers, and provided protection for all such subsequent to the given conveyance or mortgage; and held in the same case that the statute quoted imposed upon any given mortgagee the duty of mak-

ing a public record of his mortgage for the information and guidance and protection of those who, at a subsequent time, may have occasion to deal concerning the land, failing in the discharge of which duty, he shall lose the priority otherwise to be accorded to him.

In the case at bar, any one dealing with the Frybergs or with the real estate in question and examining the record would find Byrne's mortgage of record. They would find that the lien of the mortgage was ahead of any lien which they could obtain. They obtained no interest in the mortgage and had done nothing in the way of furnishing materials or labor prior to the recording of the mortgage which would give them priority under our lien statutes. Our lien statutes in Rem. Code Sec. 1132 (P. C. Sec. 9709), provided that mechanics' and materialmen's liens shall be ". . . preferred to any lien, mortgage or other incumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice." Here the Byrne mortgage had been recorded prior to the furnishing of any labor or materials, and the lien claimants had constructive notice of it. The Farrell Lumber Company had both constructive and actual notice of it. It is claimed that it is in a different position from the other appellants because of the letter which Byrne gave it promising to pay it out of the proceeds of the mort-

gage; but we think it is in no better position than any of the other claimants. It obtained no assignment of the mortgage which it could hold as against the bank's unrecorded assignment. The letter, in fact, was simply a promise to pay out of the proceeds of the mortgage, and the lumber company must have been expecting to obtain its pay out of such proceeds, but from Byrne, not from the bank. "The law is well settled that:

"Priority once obtained cannot be lost. The registry of a deed or mortgage is equivalent to a notice of it to all persons who may subsequently become interested in the property, and fully protects the grantee's rights. A mortgage having once obtained priority by record does not lose its place by being held by anyone under an unrecorded assignment. And although the mortgagee had notice of a prior unrecorded mortgage, or there are equities such that his own mortgage is in his hands sugject to them, yet if he assigns his mortgage for a valuable consideration to one who has no notice of the earlier mortgage or of such equities, the assignee is entitled to nold the mortgage as a prior lien upon the land, solely upon the ground that it was first recorded . . .

"The precedence follows them through any subsequent transfer, or through any proceedings to enforce the liens." Jones on Mortgages (7th ed.), Sec. 525, p. 828.

"To the same effect are the following authorities: *Curtis v. Moore*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. 506; *Peoples Trust Co. v. Tonkonogy*, 144 App. Div. 333, 128 N. Y. Supp. 1055; *Nashua Trust Co. v. Edwards Manufacturing Co.*, 99 Ia. 109, 68 N. W. 587, 61 Am. St. 226, 19 R. C. L. Sec. 131, pp. 361-362.

"(It may be observed that we do not concur with all the reasoning and statements in the Iowa case above cited, for that court there held that lienors and incumbrancers could not be considered as purchasers for value without notice; while we held that they are entitled to protection as purchasers, as heretofore stated.)"

We have already argued this matter at perhaps too great a length, but it seems advisable to us to review some of the language of the court in its decision because we feel that the decision cannot be justified upon the grounds stated therein.

"Mr. Haskell, as receiver of the bank, not as receiver of the building company, acquired a note and mortgage of the building company for $70,000.00. This mortgage was outstanding at the time the various contracts relating to the construction of the building were made. The receiver's purpose was to protect the property from foreclosure of the underlying mortgage, and in form it was a purchase by him. The deed from the bank to the building company of this property was a warranty deed. Under these circumstances, the ordinary rule that it would

be inequitable for the court to sanction a receiver's act for the benefit of one set of creditors, and at the same time to the injury of other creditors, lends no support to those now contending for and invoking this rule, for the bank's creditors are not the building company's creditors; nor are the latter bank creditors, and, while Mr. Haskell is receiver of both the bank and the building company, the money used in taking up the mortgage was the bank's, and he was acting as the bank's receiver, out of the control of this court in so doing. If, because of the relation between the bank and building comapny, it is sought to apply such a rule upon all equitable considerations, it can be invoked rather by the lien claimants than by the bank's receiver."

Is it not patent that the court is confusing the duties of a receiver with that of a bank commissioner liquidating the bank as a state officer? The bank commissioner was not in any manner representing the creditors of the building company and was not acting for and in behalf of two contesting sets of creditors. It is true that "the money used in taking up the mortgage was the bank's, and he was acting as the bank's receiver, out of the control of this court in so doing", as stated in the opinion, but this does not follow that the equities of the case could be resolved in favor of the lien claimants of the building company as against the creditors whom the bank commissioner represented.

The court further says, "the deed from the bank to the building company being a warranty deed, if the lien claimants were not in privity with the owner, so that they could maintain suit against the bank when the warranty, the building company and its receiver could maintain such a suit, and anything realized therefrom could be subjected to judgments recovered by the lien claimants."

What would it avail the building company to institute a suit against the bank upon the warranty? It would be met on the threshold of a court of equity, with its cardinal principles that he who comes into equity must come with clean hands, and he who seeks equity must do equity. And we believe it could obtain relief only upon the express direction that if it sought to have the bank satisfy this mortgage it would have to live up to all of the terms and conditions of the contract pursuant to which it obtained its title, then we submit the pertinent question, What would be realized therefrom for the lien claimants?

The court also says, page 170: "The bank's receiver in taking up this mortgage was merely seeking to prevent a further increase of claims against the trust estate in his hands, which, if suffered, would result in the dilution of the assets and could not but prejudice the depositors and other creditors of the bank. Under these circumstances, to hold the bank receiver's action in taking up the underlying mortgage a purchase, whereby he accepted liability

upon the warranty and also secured a position of advantage where he could defeat the lien claimants, not only has no equity in it, but would be highly inequitable." We maintain that this statement and the conclusions based thereon are not warranted by the real facts. To refuse to pay this mortgage certainly would not "result in the dilution of the assets, etc." It seems elementary that the building company could not enforce the payment of this mortgage by the bank, and if it could not do so we are at a loss to see how its lien claimants could do so. Also, how could he defeat the lien claimants? Their equity would in no manner be disturbed or relegated to a worse position than that which they occupied when this action was instituted. The court has entirely ignored the equity of the bank, which arose in its behalf when the building company breached the contract pursuant to which it obtained title to the premises in controversy.

The court's ruling illustrates the danger of a court attempting to impute an intention contrary to the express acts and declarations of the parties.

It also violates the rules that administrative officers such as bank commissioners exercising quasi-judicial functions cannot be questioned in matters which by statute they are called upon to decide.

Meechem, Public Officers, Sec. 640;
2 Cooley on Torts, 797;
Throop, Public Officers, 720-1;
29 Cyc. 1432-3; 1442-3-4.

The following part of the court's decision is also noted: "The breach of the warranty and uncertainty arising therefrom may have been one of the causes preventing the issuance and delivery of such bonds." The court in making this statement apparently overlooked the fact that the contract called for the delivery of the bonds by June, 1920, and that the mortgage was not due and payable until September, 1920, four months thereafter.

The court also says, "it is not necessary to consider the inconsistency of the bank's receiver's positions in asserting the $600,000.00 mortgage based on a title warranted by the bank and at the same time asserting the $70,000.00 mortgage, the existence of which breached the warranty on which the value of the $600,000.00 mortgage rested. The right of subrogation is an equitable right, and there is no equity in such a contention."

This statement can only be justified by an unqualified holding that the bank commissioner of the State of Washington was acting in the capacity of a receiver and not that of a state official, and in totally ignoring any equity on the part of the bank arising from the fact that it gave its property away without any consideration whatever, due to the breach of conditions of the contract by the building company.

It is true that the right of subrogation is an equitable right, but in its exercise a court must give due consideration to all equities arising out of the

circumstances of a particular transaction. The doctrine of subrogation is broad enough to include this transaction between the bank and the building company, and to protect the rights of the bank against any claim to be asserted by the building of its creditors.

Among the assets which came into the hands of the Supervisor of Banking was the purchase money agreement and the $600,000.00 mortgage executed by the building company and thereafter assigned to the bank. It was, therefore, not only the right but the duty of the Supervisor of Banking to protect the apparent securities in his hands for the benefit of the creditors whom he represents, and having done so, it would be most unjust and inequitable for the court to misconstrue his actions into the granting of an illegal preference out of the funds in his hands to the creditors of the building company. That would be the only effect of the extinguishment of the debt by judicial construction — the creditors of the building company will have been paid $70,000.00 out of the assets in the hands of the Supervisor for the benefit of the creditors and depositors of the bank. It seems to us, therefore, that had it been the intention of the Supervisor to pay this mortgage, the circumstances are such that this court, sitting as a court of equity, would revive the lien of the first mortgage for the benefit of the creditors whom the Supervisor represents.

"It is sufficient that the payment be made in performance of a supposed legal duty and in good faith, even though the party making the same were not really bound."

5 Pomeroy Equity, 5190-1.

We therefore conclude that the bank commissioner is not appointed by nor responsible to any court and has not the status of a judicial receiver, and is not an agent of the bank taken in charge for the purpose of liquidation, and his acts are not to be construed as the acts of the bank. The mortgage is a valid lien upon the premises, entitled to priority over every other lien and claim asserted in this action, and the decree of the court should be reversed with directions to allow the foreclosure of the mortgage as a prior lien.

VALIDITY OF THE $600,000.00 MORTGAGE.

The court will recall from our statement that this mortgage was executed in compliance with the terms of the contract pursuant to which the building company obtained title to the premises. It agreed with the bank, in consideration of the bank's conveying title to the premises, to erect a sixteen-story building on said premises, "to borrow $600,000.00 and execute therefor a first mortgage on said premises and in addition thereto to issue second mortgage bonds against said premises . . .", which said mortgage must be executed and recorded before ac-

tual construction shall begin, also to lease the bank the ground floor for banking purposes (Ex. 181, Tr. 105). The salient facts with reference to this mortgage seem to be that the bank deeded its property to the building company upon a written agreement to the effect that the building company would erect a building upon the premises conveyed to it by the bank and a part of said building would be used and occupied under a lease by the bank; the building company agreed to place a $600,000.00 mortgage upon the property, and also to execute a bond issue for $750,000.00, of which issue the bank should receive $350,000.00 of those bonds in payment of the building site obtained from the bank. Pursuant to this agreement the property was deeded to the building company and the building company thereupon executed a $600,000.00 mortgage and attempted to secure a loan by means thereof. It failed, however, to take any steps leading to the execution of the bond issue.

The evidence fully sustains the conclusion that the bank was not to advance any of its money for the purpose of constructing the building. Mr. Larson's testimony in that respect was completely overwhelmed by that of every other officer of the bank and also by Mr. Larson's own letters and communications. The bank funds were, however, used in spite of the objection of the state bank commissioner and other officers of the bank.

Within three or four days after the bank commissioner had warned Mr. Larson against putting any of the bank's money into the building company, Mr. Larson advanced $200,000.00, which he afterwards claimed was for the purchase of the capital stock of the building company. It will be recalled that the trustees of the bank testified that there was no authorization for Mr. Larson's acts in that respect. It will also be recalled that in December, 1920, Mr. Larson ordered an entry upon the books of the bank charging interest on this amount as a loan or interest item. In June the time expired within which the building company was to have given the bank bonds to the amount of $350,000.00 as per contract.

At about this same time Mr. Sheldon, Mr. Drury and Mr. Johnston, trustees of the bank, began to insist that the $600,000.00 mortgage be assigned to the bank to protect the bank for the amount already due it. Shortly thereafter Mr. Larson went East with the mortgage, the mortgage note and other papers and met Mr. Simpson, and being unable to obtain an advance on this mortgage had the mortgage assigned to the bank on October 7th, 1920. In December, 1920, under Mr. Larson's express directions, loans already made to the bank were placed as secured by this mortgage. At various times interest charges were made under Larson's directions against the building company on the amount advanced to the company, upon the $200,000.00 so-

called stock transaction and upon the $350,000.00 purchase price for the lots, and the mortgage was used as security therefor. The acts of the bank showed conclusively its intention of holding this $600,000.00 mortgage as security for advances made by the building company. Entries of like import were made on the books of the building company.

We also call attention to the fact that at the time Larson was trying to obtain money on this $600,-000.00 mortgage and before he had obtained an assignment to the bank the insurance company had suggested the use of this mortgage for obtaining temporary loans; in one of their communications they stated that with the insurance company's commitment and the mortgage on record they should have no difficulty in obtaining such a loan. The entire transaction upholds our contention that this mortgage was assigned to the bank in order to protect the interests of the bank.

It cannot be argued that this mortgage was without consideration when the bank had a valid binding contract to the effect that this mortgage should be executed and a loan placed thereon in order to protect the bank's interest in the lots conveyed to the building company. The evidence, therefore, establishes the fact that this mortgage was a valid mortgage from the time of its execution, being founded upon a sufficient consideration, the conveyance of the property, and that the bank advanced upon the security of the mortgage a sum of money

in excess of $500,000.00. The building company owed the bank on January 15th, 1921, the sum of $856,879.67.

This mortgage was of record prior to the time that any of the claims urged in this suit had their inception, and most of the lien claimants had actual notice that this mortgage was either of record or was to be placed on record, and all of them had legal notice that this mortgage was prior to any claim that they might thereafter acquire against the property, and most of them waived their right of lien in order to give this mortgage unquestionable priority.

We cite the following authorities as to the validity of this mortgage which was executed for the purpose of securing future advances to be used in the construction of the building:

The Seattle, 170 Fed. 284, 95 C. C. A. 480;
Shirras, 3 U. S. 260;
Lawrence v. Tucker, 23 Howard 14, 16 L. Ed. 474;
Kneeland v. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379;
Jones v. New York Guaranty & Indemnity Co., 101 U. S. 622, 25 L. Ed. 1030;
Alice Chalmers Co. v. Central Trust Co., 190 Fed. 700;
Jahn & Co. v. Mortgage Trust & Sav. Bank, 97 Wash. 504, 166 Pac. 1137;
Huttig Bros. etc., Co. v. Denny Hotel Co., 5 Wash. 122, 32 Pac. 1073;

Home Savings & Life Ass'n v. Burton, 20 Wash. 688, 56 Pac. 940;

Heal v. Evans Creek Coal and Coke Co., 71 Wash. 225, 128 Pac. 211;

Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680;

Cuttler v. Keller, 88 Wash. 334, 153 Pac. 15;

Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147;

Olson v. Smith, 84 Wash. 228, 146 Pac. 572;

Schmidt v. Cahrndt, 47 N. E. 335;

Blackmar v. Shark, 50 Atl. 852;

Andersonian Inv. Co. v. Jones, 104 Wash. 142, 176 Pac. 17.

In *Huttig Bros. etc., Company et al. v. Denny Hotel Company et al.*, 6 Wash., 122, 32 Pac. 1073, which case has been frequently referred to and followed in subsequent decisions of the Supreme Court of Washington, one of the questions presented to the court for decision was the contention that because the principal contractor had entered into a contract for the construction of a hotel, and had commenced work thereunder prior to the execution of the mortgage, he was entitled to maintain a lien paramount to the mortgage lien and that the said lien should relate back to the time of the making of the original contract. The Supreme Court refused to sustain this contention, saying (page 130 of the decision), "But the lien can hardly date from the time appellant commenced the preparation of the

materials in another state. It was to furnish the materials delivered at the building in the City of Seattle, and its claim cannot be held to have attached before the delivery thereof." Also, "Under the provisions of our statutes a materialman can only claim a lien from the time he commenced to furnish materials for the building, and such time is subsequent to the creation of the mortgage lien of which he had notice his claim for materials is subject thereto."

We quote also the following:

"The hotel building in question was in process of construction at the time of the execution of this mortgage, and the money was borrowed with the understanding that it was to be used in putting up the building, and it is contended by appellant that its claim for materials furnished should be held prior to the mortgage lien for these reasons.

" Sec. 1666, Gen. Stat., provides that the liens authorized in that chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished, etc. It is contended in this case that, as the principal contractor had entered into the contract work thereunder prior to the execution of the mortgage, he would have had a lien paramount to the claim, and that, consequently, appellant's lien should re-

late back to the time of the making of the original contract.

"Sec. 1663 provides that every person performing labor upon or furnishing materials to be used in the construction of any building, etc., has a lien upon the same for the work or labor done, or materials furnished by each, respectively, etc., and this seems to contemplate that each lien shall stand upon its own footing. Consequently, appellant is not in a position to claim the right to be subrogated to the rights of the contractor in this particular, even if he could have enforced a lien including a claim for the materials furnished by appellant as paramount to the mortgage lien, without having paid said claim or making such materialman a party to the suit, if the time within which he could claim a lien for materials had not expired, which we do not decide. See *Crowell v. Gilmore*, 18 Cal. 370." . . . "Under the provisions of our statutes a materialman can only claim a lien from the time he commenced to furnish materials for the building, and if such time is subsequent to the creation of the mortgage lien, of which he has had notice, his claim for materials is subject thereto." . . .

"It is also urged by the appellant that, by reason of the testimony given to the effect that the Denny Hotel Company borrowed this money for the purpose of building the hotel, and that the Cornell University had notice of that fact, and sought to protect itself in the mortgage against any liens that might

be created against the property by reserving the right to pay the same from the amount of the mortgage loan, it is estopped from disputing the claims of the lienors. The authorities are against this proposition, however. The respondent had a right to consider and contemplate the making of improvements upon the property as a basis for making the loan in question. And by seeking to protect itself in the mortgage against liens which might be enforced against the property, it cannot be held to have become a party thereto, or to have assumed any liability as to such liens. The provisions were inserted merely for its own protection. *Platt v. Griffith*, 27 N. J. Eq. 207; Moroney's Appeal, 24 Pa. St. 372; *Monroe v. West*, 12 Iowa, 119; I Jones on Mort. § 370."

Home Savings and Life Association v. Burton, 20 Wash. 688, 56 Pac. 940, contains a more elaborate discussion of the priority of a mortgage to secure future advances over liens and very clearly and forcibly holds, as stated in the syllabus, that "a mortgage to secure future advances is entitled to priority over the liens of mechanics and materialmen, if recorded prior to the performance of service or furnishing of materials, even if a portion of the advances are not made until after the mechanics have attached under General Statute, Sec. 1666, according mechanics' liens preference to any lien or mortgage which may have attached subsequent to the time when the building was commenced, work done,

or materials furnished, or which was unrecorded at that time, or of which the lien-holder had no notice at the commencement of furnishing services or materials." The trial court held the mortgage valid only as to advances made prior to beginning of work. This ruling was reversed.

The court uses the following language on page 696:

"It would seem that, under the provisions of this statute and the authorities cited, it could hardly be doubted that appellant's mortgage is prior and superior to the liens of these respondents. But it is nevertheless claimed by the learned counsel for Carson, Davis and Julian and George P. Howard that a mortgage to secure future advances becomes an actual charge upon the land covered by it at the time when such advances are actually made, and then only to the amount of the advances; that, until the advances are made, neither the land described in the mortgage, the parties to it, nor third persons, are bound by it, and that the record of such mortgage cannot operate as constructive notice to subsequent incumbrancers. And in support of their position counsel cite the following cases: *Ladue v. Detroit & M. R. R. Co.*, 13 Mich. 380 (87 Am. Dec. 759); *Schultze v. Houfes*, 96 Ill. 335; *Ter-Hoven v. Herns*, 2 Barr. 96; Bank of Montgomery County's Appeal, 35 Pa. St. 170; *Spader v. Lawler*, 17 Ohio 371 (49 Am. Dec. 463); *Boswell v. Goodwin*, 31 Conn. 74 (81 Am. Dec. 169)."

"It is urged with much earnestness that appellant's mortgage never attached, or, in other words, did not become a lien as against these respondents, except as to the first advancement made thereunder, for the reason that work was commenced by the contractor upon the building and certain materials furnished therefor, before any of the subsequent advances were made. It must be admitted that the authorities cited afford a legitimate basis for the argument, but we are not disposed to adopt the rule contended for as the law of this state. These cases are against our judgment, based upon an erroneous view as to the real nature of equitable liens, and the effect of our recording acts. These very cases were reviewed and the doctrines announced by them clearly pointed out by Pomeroy in his valuable treatise on Equity Jurisprudence. Referring to them and other cases holding the same view, he says:

" 'They seem to regard the lien for securing future advances as only arising, or at all events as only perfected so as to be available, at and from the time when the advance is actually made. An advance, therefore, although in pursuance of a prior mortgage duly recorded, if made after the record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, is affected with constructive notice of such subsequent encumbrances or conveyance, and its lien is consequently postponed to that of second record. By this rule, a mortgage to secure future advances secures a preference only

for those advances, actually made before the record of a subsequent encumbrance or conveyance; it loses its precedence for all advances made after such record.' "

"The learned author then expresses his own opinion in the following language:

" 'The fundamental error of this view, in my opinion, consists in its mistaken conception of the nature of an equitable lien, in regarding the lien as arising at and from the act of making the advance, instead of from the previous executory agreement by which the land was bound as security for the future advances.' 3 Pomeroy, Equity Jurisprudence (2nd Ed.) § 1199, and note.

See, also, 1 Jones, Mortgages (5th Ed.), § 372.

"Mortgages to secure future advances have always been sanctioned by the common law . . . In this country, mortgages made in good faith for the purpose of securing future debts have generally been sustained, both in the early and in the recent cases. It does not matter that the future advances are to be made to a third person or for his benefit at the request of the mortgagor. Neither is the validity of a mortgage to secure future advances affected by the fact that the advances are to be made in materials for building instead of money. A mortgage is not fraudulent because it is given for a larger amount than the actual loan made at the time, with a view to its covering future loans up to the amount of the mortgage." 1 Jones Mortgages (5th Ed.), § 365.

" 'Claimants of liens', says Mr. Phillips, 'are bound to know what has been done under a duly registered mortgage. Mortgages, and deeds in the nature of mortgages, to secure future loans or advances, if *bona fide*, have always been sanctioned, and if otherwise unexceptionable, their validity cannot be questioned. The mere fact that materials are to be supplied, instead of money, will not impair their validity, and, if given before the commencement of a building, will be good against mechanics' liens.' " Phillips, Mechanic's Liens (3rd Ed.), § 236.

"This court recognized the validity of such mortgages in the case of *Huttig Bros. Mfg. Co. v. Denny Hotel Co., supra.* There being no doubt, then, that mortgages to secure future advances are valid liens, we think that, under our statute, they are just as effectual against subsequent incumbrances as are mortgages to secure a present indebtedness. A mortgage given in part to secure future advances was under consideration in the well-considered case of *Tapia v. Demartini*, 77 Cal. 383 (19 Pac. 641, 11 Am. St. Rep. 288), in which the court says:

" 'It is firmly settled by a long line of decisions that a mortgage, made in good faith to cover future advancements, is valid, not only as between the immediate parties to the instrument, but as against subsequent purchasers or encumbrancers, if properly recorded.' "

"Many cases are cited by the court in support of its declaration, among which is *Shirras v. Caig*, 7

Cranch 34, which is a case entitled to much weight, not only on account of the learning and ability of the court which rendered the decision, but by reason of the fact that the question was determined upon the general principles of equity, without reference to any statutory provision such as we have in this case. The mortgage considered in this California case was, like the one under consideration here, for a specific sum, and did not disclose upon its face that it was given in part for future advancements; but the court held that it was not invalid on that account. In the same case the court further observed:

"'The mortgage, as against subsequent encumbrancers, becomes a lien for the whole sum advanced from the time of its execution and not for each separate amount advanced from the time of such advancement, although the right to enforce the collection thereof can only arise upon each advancement being made.'"

In *Heal v. Evans Creek Coal and Coke Company*, 71 Wash. 225, 128 Pac. 211, the court, in holding that a mortgage to secure future advances is valid and takes precedence over laborer's liens for services performed after the mortgage is recorded, says:

"It is next objected that the advancements made to the use of the mortgagor by the mortgagee and his assignees thereunder were not secured by the security clause in the mortgage, and that hence the

court erred in allowing these sums as a part of the mortgage debt. The mortgage clearly provided for future advances on the part of the mortgagor, and for the security of such advances by the mortgaged property. Such mortgages are valid in this state, and create a priority of lien over that of mechanics and materialmen, if recorded prior to the performance of the services or the furnishing of the materials for which the lien is claimed, even though the advancements be made subsequent to the time the liens are filed. *Home Sav. & Loan Ass'n v. Burton*, 20 Wash. 688, 56 Pac. 940. In this case the advancements were made prior to the performance of the services for which the liens are claimed, and for a much stronger reason are prior thereto."

In *Keane Guaranty Savings Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680, the court held that a mechanic's lien was inferior to that of a prior recorded mortgage, although the contract for furnishing material was entered into prior to the recording of the mortgage; the following language is cited:

"Appellant claims that he acquired a good title to the lots under the foreclosure by Whittier, Fuller & Co. of their mechanic's lien thereon. But the evidence shows that materials were not furnished for use in the building until March 14th, 1890, while respondent's mortgage had been of record since December 23rd, 1889. It is true the contract for furnishing this material was entered into in September, 1889, but the date of the actual furnishing of the

material governs the inception of the lien. *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122 (32 Pac. 1073); *Home Savings & Loan Ass'n v. Burton*, 20 Wash. 688 (56 Pac. 940). Under these decisions the lien of the materialmen was clearly inferior to that of the mortgage."

In *Cuttler v. Keller*, 88 Wash. 334, 153 Pac. 15, the court held a mechanic's lien inferior to the lien of a prior real estate mortgage, recorded prior to the commencement of the furnishing of the labor or material, under Rem. Code, Sec. 1132, and in construing that section of the statute said:

"The language of this section carries the necessary implication that the lien accorded to mechanics and materialmen is subject to the lien of a prior mortgage on the real estate recorded prior to the commencement of the performance of the labor or the furnishing of the material, or of which the lien claimant had notice. We have uniformly so construed it. *Home Savings & Loan Ass'n v. Burton*, 20 Wash. 688, 56 Pac. 940; *Baker v. Sinclaire*, 22 Wash. 462, 61 Pac. 170; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *Averill Mach. Co. v. Allbritton*, 51 Wash. 30, 97 Pac. 1082."

NO NECESSITY FOR STATING OBJECT OF MORTGAGE.

In *Shirras v. Craig*, 7 Cranch 50, 3 U. S. (3 L. Ed.) 260, it was said by Chief Justice Marshall:

" 'It is true that the real transaction does not appear on the face of the mortgage. The deed pur-

ports to secure a debt of £30,000 sterling due to all the mortgagees. It was really intended to secure different sums, due at the time for particular mortgages, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentations.' "

In *Lawrence v. Tucker*, 23 Howard 14, 16 L. Ed. 474, the Supreme Court of the United States held that parol evidence was admissible to prove that a mortgage and note for $5,500.00 and future advances not to exceed in all an indebtedness of $6,000.00 was intended to secure advances up to $11,500.00, and that a mortgage for existing debts and future advances was valid. The following quotation from the decision is called to the court's attention:

"An objection of this kind was made in the case of *Shirras v. Caig*, 7 Cranch 34; but this court then said: It is true the real transaction does not appear

on the face of the mortgage; the deed purports to have been a debt of £30,000, due to all of the mortgagees. It was really intended to have different sums due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be encountered to an uncertain amount. After remarking that such misrepresentations of a transaction are liable to suspicion, Chief Justice Marshall adds:

" 'But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation.' In this case the complainant has not been deceived, and the variance between the alleged indebtedness and that advances were to be made afterwards gives to his suit no additional force or equity."

"No proof was given by the complainant that he had been injured or deceived by it into making his purchase under the mortgages of Briggs and Atkyns, and that cannot be presumed in his behalf. In fact there is not an averment in the complainant's bill in favor of the equity of his demand, which is not met and denied in the defendant's answer, and which has not been disproved by competent testimony. We do not think there is anything in the objection that the mortgage to H. A. Tucker to se-

cure future advances by the firm of H. A. Tucker & Co. cannot stand as security for advances made after the admission of new partners into that firm. The cases cited in support of this objection do not sustain it, and we have not been able to find any one that does. They relate exclusively to stipulations for an advancement of money to a copartnership after a new member has been taken into the firm."

"In respect to the validity of mortgages for existing debts and future advances, there can be no doubt, if any principle in the law can be considered as settled by the dicisions of courts. This court has made three decisions directly and inferentially in support of them: *U. S. v. Hooe*, 3 Cranch 73; *Conrad v. Atlantic Insurance Company*, I Pet. 448; *Shirras v. Caig*, 7 Cranch 34. Tilghman, Ch. J., says, in *Lyle v. Ducomb*, 5 Binn. 590, 'There cannot be a more fair, *bona fide* and valuable consideration than the drawing or indorsing of notes at a future period, for the benefit and at the request of the mortgagors; and nothing is more reasonable than the providing a sufficient indemnity beforehand.' Mr. Justice Story declared, in *Leeds v. Cameron*, 3 Summ. 492, that nothing can be more clear, both upon principle and authority, than that at the common law a mortgage, *bona fide* made, may be for future advances by the mortgagee as well as for present debts and liabilities. I need not do more upon such a subject than to refer to the case of *The*

U. S. v. Hooe, 3 Cranch 73, and *Conard v. Atlantic Insurance Company*, 1 Pet. 448."

In *Jones v. N. Y. Guaranty & Indemnity Co.*, 25 L. Ed. 1030, 101 U. S. 622, it is said:

"A mortgage for future advances was recognized as valid by the common law. *Gardner v. Graham*, 7 Vin. Abr. 22, pl. 3. See, also, *Brinkerhoff v. Marvin*, E *Johns* (N. Y.) ch. 320; *Lawrence v. Tucker*, 23 How. 14.

"It is believed they are held valid throughout the United States, except where forbidden by the local law."

In the case of *The Seattle*, 170 Fed. 284, the Circuit Court of Appeals for the Ninth Circuit held that where by the terms of a mortgage it was made optional with the mortgagee whether to make or refuse future advances, such future advances were within the lien of the mortgage and prior to that of a second mortgage, if made by the first mortgagee without actual notice of the second encumbrance, which was not imported by the recording of the second mortgage.

This decision is a complete answer to arguments already presented against the validity of the $600,000.00 mortgage, and we call the court's attention to the following language of Judge Gilbert:

"The principal question is whether the appellee's mortgage shall be held to cover advances made by the bank after the date of the appellant's mortgage. The mortgage to the bank is in the form of a bill of

cure future advances by the firm of H. A. Tucker & Co. cannot stand as security for advances made after the admission of new partners into that firm. The cases cited in support of this objection do not sustain it, and we have not been able to find any one that does. They relate exclusively to stipulations for an advancement of money to a copartnership after a new member has been taken into the firm."

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This decision is a complete answer to arguments already presented against the validity of the $600,-000.00 mortgage, and we call the court's attention to the following language of Judge Gilbert:

"The principal question is whether the appellee's mortgage shall be held to cover advances made by the bank after the date of the appellant's mortgage. The mortgage to the bank is in the form of a bill of

sale, and is given 'in consideration of the money heretofore advanced . . . for the construction of the dredge hereinafter mentioned, and such further advances as may hereafter be made.' Neither the amount so advanced, nor the amount thereafter to be advanced, is stated in the instrument. If Watt had not been a party to that bill of sale, and were not chargeable with full notice of the sum which had been advanced by the bank, very different questions might be presented; but he is to be charged with notice that at that date the bank had advanced $50,517.35, and, although the limit of future advances was not fixed, there can be no question that, so far as the rights of Watt as a second incumbrancer are concerned, the mortgage was sufficiently definite to protect the bank on its account with the bridge company, on which, from time to time, credits and debits were made, up to the amount which was due the bank at the time when the mortgage was made. Except in one or two states, where it is prohibited, a mortgage may be made to secure future advances to the mortgagor, which shall become a first lien for the amount actually loaned, although a part or all thereof be not advanced until after a subsequent lien shall have attached; and such is the law in the State of Washington. *Home Savings & oLan Ass'n v. Burton*, 20 Wash. 688, 56 Pac. 940. But where, by the terms of the first mortgage, as in this case, it is made optional with the mortgagee whether to make or refuse future ad-

vances, there is some diversity of decision on the question whether he will be protected beyond the sum which he shall have actually loaned or advanced at the date when a junior lien is placed of record. By the decided weight of authority, however, and we so hold, such future advances, although optional, are within the lien of the mortgage, and prior to that of a second mortgage if they were made without actual notice of the second incumbrance, and the recording of a second mortgage does not import notice to the first mortgages. *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Shirras v. Caig*, 7 Cranch 34, L. Ed. 260; *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; *Savings & L. Society v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Davis v. Carlyle*, 142 Fed. 106, 73 C. C. A. 330; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Rowan v. Sharks Rifle Mfg. Co.*, 29 Conn. 282; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Frye v. Bank of Ill.*, 11 Ill. 367; *Ripley v. Harris*, 3 Biss. 199, Fed. case No. 11853; *Anderson v. Liston*, 69 Minn. 82, 72 N. W. 52; *Schmidt et al. v. Zahrndt*, 148 Ind. 447, 47 N. E. 335 and cases there cited."

In *Allis-Chalmers Co. vs. Central Trust Co.*, 190 Fed. 700 at p. 705, the court used the following language:

"Apparently the framers of the statute did not contemplate the impairment of the ordinary relation of mortgagor and mortgagee. The fact that the bonds were issued for the purpose of raising

funds to improve the mortgaged property does not create an equitable estoppel against the mortgagee and bondholders to prevent them from claiming that their mortgage gives a prior lien. *Dunham v. Railroad Co.*, 1 Wall. 254, 17 L. Ed. 584; *Thompson v. Railroad Co.*, 132 U. S. 69, 10 Sup. Ct. 29, 33 L. Ed. 256; *Porter v. Pittsburgh Co.*, 120 U. S. 649, 7 Sup. Ct. 1206, 30 L. Ed. 830; *Toledo, etc., R. R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; Jones on Liens, § 1458.

"Whoever undertakes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract and upon such liens as the statute grants in definite terms, and not upon the expectation of displacing the priority of mortgage liens. The argument that there is some sort of superior equity in claims for work and materials over liens for money previously advanced upon mortgage is without merit, and the chancellor cannot apply such a principle either to displace vested liens or to broaden a lien statute by the construction which disregards absolutely the rights in a mortgage security. *Kneeland v. American Loan Co.*, 136 U. S. 89, 97 *et seq.*, 10 Sup. Ct. 950, 34 L. Ed. 379."

In *Jahn & Co. v. Mortgage Trust & Sav. Bank*, *supra*, the Supreme Court of Washington held, as set forth in the syllabus, as follows:

"Where the contractor, at the time of entering into the contract, knew that a mortgage was to be given as a prior lien to raise money to pay for the work, the mortgage is prior to the claims of the contractor, although work was commenced before the mortgage was executed and filed, notwithstanding Rem. Code, Sec. 1132, providing that a mechanics' lien is preferred to any incumbrance attaching subsequent to the commencement of the work.

"Under Rem. Code, Sec. 1132, providing that a mechanics' lien is preferred to any incumbrance attaching subsequent to the commencement of the work for which the lien is given, a mortgage given to raise money to pay bills and expenses incurred in the progress of the work, but filed subsequent to the commencement of work on the building, is superior to claims for materials furnished to the contractor long after the mortgage was made and recorded."

The rule is thus stated in the various text books:

In 15 Am. and Eng. Enc. Law, p. 801, the rule is stated as follows:

"When the mortgage on its face gives such information as to the purpose and extent of the undertaking of the mortgage that any one interested may, by the use of ordinary diligence, ascertain the extent of the incumbrance, then the better view seems to be that the mortgage will have precedence over subsequent incumbrances as to all advances

made within the terms of a mortgage, whether made before or after such junior incumbrance, even though the extent of the contemplated advances is not limited, and whether the mortgagee be bound to make the advances or not."

In Pom. Eq. Jur., § 1199, it is stated as follows:

"The prior mortgage, therefore, duly recorded, has a preference over subsequent recorded mortgages or conveyances, or subsequent docketed judgments, not only for the advances previously made, but also for advances made after their recording or docketing without notice thereof. As the record of the second incumbrance does not operate as a constructive notice, it requires an actual notice to cut off the lien of the prior mortgage; and the subsequent incumbrancer may, by giving actual notice, at any time prevent further advances from being made to his prejudice."

In 27 Cyc. 1069 the following statement is found:

"Future Advances: A mortgage may be made as well to secure future advances or loans of money to be made by the mortgagee to the mortgagor as for a present debt or liability, and if executed in good faith it will be a valid security. It may also be made to cover the value of goods thereafter to be sold to the mortgagor, or for the payment of future accruing accounts between the parties, and is equally valid, although the advances are to be made in building materials in lieu of money. Nor is it essential that the mortgage should be absolutely bound

to make the contemplated advances; between the original parties at least the mortgage will be a valid security, although the making of the advances was left to his option or discretion. And the validity of the mortgage is not necessarily impaired by the fact that it does not show upon its face the real character of the transaction; although it recites an existing debt as its consideration, it may be shown that it was intended to cover future advances, and the mortgagee can recover the amount actually advanced up to the time of enforcing the security, but the mere fact that the mortgage was given to secure future advances, while it recites a present debt, or that it was given for a larger amount than was loaned at the time, and with a view of covering future loans, is not conclusive of fraud."

In 19 Ruling Case Law, p. 429, § 210 thereof is as follows:

"The record of a mortgage to secure future advances is notice to all subsequent incumbrancers as to advances made before their incumbrances. Such a mortgage is protected by the bankruptcy law, and, to the extent of the advances actually made, is good as against an assignee in bankruptcy. All the adjudications appear to agree that, in the absence of notice of an inferior lien, the holder of security for future advances may continue to treat the property as free from subsequent incumbrance, and therefore can safely make further loans to the debtor. His prior equity under the mortgage is superior to the

subsequent equity of one who holds a later lien as to all advances made in ignorance of such subsequent incumbrance, whether made before or after it attaches to the property."

1 Jones on Mortgages § 375, at p. 525, the following statement of the law is set forth:

"The agreement under which advances to a certain amount are to be made need not be in writing, to be binding and effectual against subsequent liens, when it has been acted upon. Thus, if a mortgage is made to secure future advances to be used in the construction of a building on the mortgaged land, and a mortgage for the contemplated amount is made and recorded, it has priority against a mechanic's lien for materials furnished in the construction of such building to the full amount of the mortgage, if the advances are actually made to that amount, although the agreement under which they are made is verbal only." And cases therein cited.

We call the court's attention particularly to the case of *Blackmar v. Shark*, 50 Atl. 852, in which the Supreme Court of Rhode Island held in a case where a mortgage to secure future advances was executed to a person who paid no consideration therefor, and which was subsequently transferred without consideration to a third person, with the understanding and agreement that such third person should make advances in installments to the mortgagor as the building of certain houses progressed, and in which case the *mortgage was not*

transferred until after lien claimant had commenced work on such building, that the mortgage was valid from the date of its execution and recording, entitling the said third party to priority over the said lien claimant.

Practically all of the lien claimants had actual knowledge of the existence of this mortgage, and waived their right of lien so that this mortgage might stand unimpeachable by them. Of course it is elementary that the lien waiver's clause would mean nothing except in case of a breach of their contract, so it must be held that all the parties had in mind the possibility of the failure of the building company to perform the terms of the contracts it had with the lien claimants. Having thus agreed, and with full knowledge that the mortgage was to be used for the purpose of obtaining money with which to construct the building, their rights must be held to be subordinate to that of the mortgage.

Jahn & Co. v. Mortgage Trust & Sav. Bank, 97 Wash. 504, 166 Pac. 1137;
Joralman v. McPhee, 31 Colo. 26, 71 Pac. 419, 422;
Kline v. Hodge, 90 Iowa 212, 57 N. W. 717;
Hoagland v. Lowe, 39 Neb. 397, 58 N. W. 197;
Patrick Land Co. v. Leavenworth, 42 Neb. 715, 60 N. W. 715;
2 Jones on Liens 44, Sec. 1457.

In *Jahn & Co. v. Mortgage Trust & Sav. Bank*, *supra*, the court used the following language, very pertinent to this case:

"If it is not conceded, we think it is proved beyond question that, at the time the contract for the construction of the building was entered into between the Simpson Company and the Coast Construction Company, it was understood by both parties to the contract that the Simpson Company was to borrow the money with which to construct the building. The arrangements for the money and for a mortgage to secure the same had already been made, and the Coast Construction Company was aware of that fact. The contract provided that $35,000.00 of the contract price should be used in the payment of bills against the 'building as same may be required in the progress of construction'. It is conceded that this money was so paid. The mortgage was executed on the 5th day of February, about a week after the contract was entered into. The contract provided that the balance of the $47,000.00, after the $35,000.00 was paid, namely $12,000.00, was to be paid by a second mortgage for that amount. After the building was completed, materials which were furnished to the contractor, amounting to something like $9,500.00, had not been paid for, and liens had been filed against the building. The Simpson Company refused to execute the mortgage until these lien claims were paid by the contractor. We think it is plain that the Simpson company was not required by the terms of the contract to execute the mortgage for $12,000.00 until those lien claims were satisfied, because the con-

tract provided that it was the duty of the Coast Construction company to furnish to the Simpson company satisfactory evidence of the payment of all bills and expenses incurred in the construction and completion of the building or in connection therewith.

"We have no doubt that the mortgage of the Mortgage Trust & Savings Bank is prior to the claim of the Coast Construction Company, because the Coast Construction Company, at the time it entered into the contract, *knew that mortgage was to be given and was to be a prior lien upon the premises.* Section 1132, Rem. Code, provides, in substance, that mortgage liens filed or recorded prior to the performance of labor or the furnishing of materials are prior liens. In Bloom on Mechanics' Liens and Building Contracts, at Sec. 499, on page 460, it is said:

" 'But where the claimant enters into a contract with the owner, and a third party takes a mortgage upon the property, and parts with value, relying upon the terms of that contract, the claimant and owner cannot change the terms of the contract to the detriment of the mortgagee, and the lien, so far as it is extended by the change of the agreement, will not take priority over the mortgagee . . .' "

"In *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15, in referring to Rem. & Bal. Code, Sec. 1132, we said, at page 339:

" 'The language of this section carried the necessary implication that the lien accorded to mechanics

and materialmen is subject to the lien of a prior mortgage on the real estate recorded prior to the commencement of the performance of the labor or the furnishing of the material, or of which the lien claimant had notice. We have uniformly so construed it.' " (Citing a number of authorities.)

"In *Olsen v. Smith*, 84 Wash. 228, 146 Pac. 572, we said:

" 'Section 1132 expressly declares the mechanics' lien a preferred lien to any incumbrance attaching subsequent to the commencement of the work for which the lien is given, and also to any incumbrance which may have attached previously to the time, and was not filed for record until after that time, of which the lien claimant has no notice.' "

"See also *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147, and *Heal v. Evans Creek Coal and Coke Co.*, 71 Wash. 225, 128 Pac. 211."

"SINCE THE COAST CONSTRUCTION COMPANY HAD ACTUAL NOTICE OF THIS MORTGAGE IT WAS BOUND BY IT, AND CANNOT NOW CLAIM THAT ITS LIEN FOR EXTRAS AND FOR THE BALANCE DUE UPON THE CONTRACT IS PRIOR TO THAT MORTGAGE."

"Where mechanics or materialmen have notice of a mortgage which is given to secure funds to construct an improvement and know that the funds thus obtained are expended in that way, their rights are held subordinate to that of the mortgage. They

are bound by such an arrangement to the extent that funds are advanced and applied."

2 Jones on Liens 44, Sec. 1457.

"In other words, when they know that a structure upon which they are engaged has been pledged as security for advances to be applied towards its construction by a contract entered into before the work of erection was commenced, they are bound by such an arrangement, up to the extent of the funds under such contract are actually advanced and applied to construct the building."

Joralman v. McPhee, 31 Colo. 26, 71 Pac. 419-422.

A law which attempts to make a mortgage subject to subsequent liens for labor or material is unconstitutional, as said in *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513. "No case ever held that a mortgagor could, without the authority of the mortgagee, expressed or implied, create a lien on mortgaged property so as to give it precedence of the mortgage."

A mortgage should be construed with reference to the purposes for which it was made and objects intended to be achieved by its operation.

Brown v. Pennsylvania R. Co., 250 Fed. 513;
In re Corbitt, 248 Fed. 988.

We believe it will be conceded that the court, in interpreting this mortgage, must follow the rules laid down by the state tribunal, and we submit that under the decisions of the Supreme Court of the

State of Washington this mortgage must be held to be prior to all other liens and claims except the $70,000.00 mortgage.

> *Warburton v. White*, 176 U. S. 484, 44 L. Ed. 555;
> *Re McNiel*, 13 Wallace 236, 20 L. Ed. 624;
> *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006;
> *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359;
> *In re Kellogg*, 113 Fed. 120, 121 Fed. 333;
> *In re Corbitt*, 248 Fed. 988.

This mortgage was not fraudulent as to any lien claimants, because they were not creditors at the time of the execution of the mortgage and had full knowledge of the purpose of the mortgage, and the mortgage itself was duly recorded.

> *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108;
> *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207;
> *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075;
> *In re Grocers Baking Co.*, 266 Fed. 900.

The trial court, in holding the invalidity of this mortgage, used the following language:

"If the $600,000.00 long term mortgage were placed to secure a debt of a lesser amount immediately falling due, it must be held a pledging for a pre-existing debt, and void. Const. Wash. art. 12,

par. 6; *Farmers' Loan & Trust Co. v. San Diego St. Car Co.* (C. C.), 45. Fed. 518; *Kemmerer et al. v. St. Louis Blast Furnace Co. et al.*, 212 Fed. 63, 128 C. C. A. 519;*Memphis & Little Rock R. R. Co. v. Dow*, 120 U. S. 237, 7 Sup. Ct. 482, 30 L. Ed. 595; *In re Progressive Wall Paper Co.* (D. C.), 224 Fed. 143, I find no equity in the bank, or its receiver, arising out of these transactions, and hold the bank's receiver a general creditor on account of such advances."

There is nothing in the evidence to justify the statement that this mortgage was to be used as a pledge for a pre-existing debt. The mortgage was to be used for the purpose of obtaining the full $600,000.00 due according to the terms of the mortgage. The mortgage was at no stage of the transaction used or intended to be used for the purpose of securing a pre-existing debt.

It is academic in construing a constitutional provision that the prime object is, if possible, to ascertain the purpose of the framers thereof.

The title of Article XII, Sec. 6, of the Constitution of Washington is: "Limitations upon Issuance of Stock."

That the intendment of any subdivision of a provision is not limited to itself alone, when such intendment cannot be clearly gathered without reference to the whole scheme of the provision, is also, we believe, academic and elementary.

The entire section 6, including the title, reads:

"Limitations Upon Issuance of Stock: '*Corporations shall not issue stock, except to bona fide subscribers therefor*, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void."

Reading the title and the language of the section as a whole, it must be clearly apparent that the purpose of the framers of this section was to prevent the mischiefs resultant from the flooding of the market with stock and bonds or other evidences of indebtedness that do not represent anything whatever of substantial value. A prohibition against the issuing of stock, or bonds, or other obligations, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, to protect stockholders from speculation, and to guard the public against securities which were absolutely worthless.

Memphis and Little Rock R. R. Co. v. Dow et al., Trustees, 120 U. S. 287, 30 L. Ed. 595.

In the above case the stocks and bonds at issue were issued as security for a past indebtedness.

In *Granite Brick Co. v. Titus*, 226 Fed. 557, of case 559, Decision 568-9-10, stock was issued to secure past, present and future advances. Held valid. In this decision a general review of former Federal cases is made to the purpose of showing the intendment of the constitutional provisions in the states general is to prevent fictitious issue of stock or indebtedness.

Farmers' Loan & Trust Co. v. San Diego St. Car Co., 45 Fed. 518, cited in the decision of the court.

While there are some facts in this case which bear a striking analogy to the one at bar, yet in its general analysis this cannot be said to be true. There are marked and distinguishing features which wholly destroy its weight as an authority upon the question here at issue.

It will be noted that at a stockholders' meeting a resolution was unanimously adopted authorizing the trustees to incur a bonded indebtedness secured by mortgage for the purpose of borrowing money to be used to extend the street railroad, provide for rolling stock and equipment therefor, and to pay for labor done and to be done in the construction, maintenance and operation of said road.

The directors did not carry out those purposes. On the contrary, through various and different proceedings they individually, and not by warrant of the board of directors, contrived to and did cause

the bonds which they had caused to be issued in pursuance of such directions to be pledged for prior indebtedness to different corporations, in which they were largely interested as officers and stockers, and not a dollar thereon was realized or applied to the purposes for which the stockholders had directed the loan to be made.

Certain statutory provisions in the California code were also more or less controlling in this decision, p. 527.

In *Kimmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 63, also cited, a note and bonds as collateral security were given to secure a pre-existing and past due indebtedness only. The note was for $3,644.62. Bonds amounted to $4,000.00 par. Four months after date of note creditor caused notes to be sold and bought in for self for $100.00. Creditor presented claims against receiver for both amount of notes and amount of bonds. The court held the bonds invalid under constitutional provision similar to Washington.

The court said: "That no consideration whatever passed at the time the bonds were issued, and none ever has passed on account of the bond issue," hence such claim (on bonds) was fictitious, p. 65.

Court further says: "We find the whole trend of authority supporting the proposition that there must be a present consideration in order to satisfy the demands of constitutional provision."

In re Progressive Wall Paper Company, 224 Fed. 143.

The above named corporation was adjudged bankrupt, Nov. 23, 1914. In July, 1905, the Progressive Wall Paper Corporation borrowed $11,000.00 from the First National Bank of Ballston, Spokane, and gave its promissory note therefor, which was endorsed by four of the officers of said corporation as individuals. Partial payment and renewals were made from time to time until January, 1912, when the bank held the note of the corporation due on that day for $7,000.00. In said January, 1912, the corporation gave a renewal note for said $7,000.00. One of the endorsers, having ceased to be a member of said corporation, refused to endorse the same and as further security the corporation delivered to said bank as collateral security seven second mortgage bonds, made by the corporation, which were secured by mortgage on its real estate and plant. Prior to this, November 1st, 1911, the directors of the corporation had passed a resolution authorizing the issuing of bonds and mortgages to secure this said indebtedness and to secure as collateral the payment of other notes of the corporation which may be given hereafter in the transaction of its business and to secure renewals.

The referee found under the constitutional provision that said bonds "had never been legally issued, and that the same were null and void", and further that such resolution was illegal in so far as it authorized the issue of said bonds as collateral

security for antecedent debts. The District Judge, in reversing this finding, after quoting the constitutional provision, in his decision says:

(1). "The corporation law of the State of New York and many recent court decisions of that state and Federal decisions, make it plain, I think, that the existence of a valid indebtedness is a sufficient consideration for a new promise or a pledge of property as security for the payment of such indebtedness. The old debt and extension of time for the payment thereof is value within the meaning of the law.

(2). In this case the bank not only extended the time for the payment of the debt by accepting the new note payable at a future day, but lost the benefit of the name and obligation of one of the indorsers to pay the debt, and accepted in lieu thereof and in consideration of the extension of time of payment the bonds in question. As stated, these bonds were a promise to pay executed by the debtor; but they were secured by mortgage upon the real estate of the debtor. This was a new and an additional security. Negotiable Instruments Law (Consol. Laws, C. 38, Sec. 51), provides:

'Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.'

See language of Justice Miller, in *King v. Bowling Green Trust Co.*, 145 App. Div. 398-402, 125 N. Y. Supp. 977.

There was no fraud in this transaction. The bonds were turned over to the bank as security for the payment of the note more than four months prior to the bankruptcy, and, as stated, there was a sufficient consideration, a valuable consideration."

The case of *Memphis, etc. R. Co. vs. Dow*, 120 U. S. 287, 30 L. Ed. 595, is also cited, and we particularly invite the court's inspection and consideration of this case, which we consider fully sustains our contention with reference to this particular phase of the validity of the mortgage. The court in that case had under consideration a constitutional provision of the State of Arkansas, similar to that of the State of Washington, in which there was a prohibition against the issuance of stocks or bonds except for money or property actually received or labor done. After deciding that where it is the duty of a mortgagor to protect junior encumbrances against a prior lien and he fails to do so and they pay the amount of such lien to prevent a forced sale of the property, they are entitled to be subrogated to the right of the prior lien holders, the court used the following language:

"Recurring to the language employed in the Arkansas Constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private

corporation depend upon the inquiry whether the money, property or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used that the framers of that instrument intended to restrict private corporations — at least, when acting with the approval of their stockholders — in the exchange of their stock or bonds for money, property or labor upon such terms as they deem proper; provided, always, the transaction is a real one based upon a present consideration and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the State Constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders."

It may be argued to the court that the bank and the building company were in reality one corporation, and for that reason the corporate entity of the building company should be disregarded. Without going too much into detail, we wish to state very briefly some of the evidence relative to this phase of the litigation. On June 15th, 1919, the capital stock of the bank was $200,000.00 and there were

53 stockholders. On June 16th, 1919, the capital stock was increased to $400,000.00, which stock was held by 189 stockholders; the trustees held only 398 shares out of a total of 4,000. On April 12th, 1920, stock was increased to $1,000,000.00, held by 526 stockholders, and the trustees held 2,040 shares out of a total of 10,000. The stock of the building company, with the exception of a few shares, was subscribed for by O. S. Larson individually. Without the knowledge or consent of the trustees of the bank he ordered this stock executed in the name of the bank. The evidence shows that it was the intention of the building company to sell its stock on the open market to anyone who wished to purchase the same. This is even indicated in Larson's own letter.

The argument may be advanced to the effect that the building comapny was promoted for a fraudulent purpose by the bank, but we have pointed out to the court that the fallacy of this argument lies in the fact that the bank itself was defrauded to a greater extent than that claimed by anyone else. As we have before pointed out, the bank has nearly $900,000.00 of its money in the property claimed by the building company, and this certainly is not evidence tending even remotely to prove fraud on the part of the bank.

We believe that the authorities that have disregarded the existence of a corporate entity have been based solely upon one of three grounds, namely:

1. On the ground of fraud or fraudulent acts.

2. Agency for parent corporation.

3. Evasion of statutory obligations.

Fletcher Enc. Corporations, Vol. 1, Sec. 44, 45, 46, sets out the three above grounds amply supported by authority. Sec. 44, entitled "FRAUDULENT ACTS", is in part as follows:

"The doctrine of corporate entity is not permitted to stand in the way of defeating fraud. It follows that it is idle to promote a corporation for the purpose of endeavoring to accomplish fraud or other illegal acts under the cloak of the corporate fiction. Where this is attempted, courts of law, equity, or bankruptcy do not hesitate to tear aside the veil of corporate entity and to look beyond it and through it at the actual and substantial beneficiary. A notable instance is found in cases where it is sought to delay, hinder, and defraud creditors by means of 'Dummy' in corporations. The courts have uniformly held that there is no magic in incorporation and refuse to apply the doctrine of corporate entity to enable such scheme to be successful."

Section 45, "AGENCY FOR PARENT CORPORATION". "The legal fiction of distinct corporate existence may also be disregarded in a case where a corporation is so organized and controlled and its affairs are so conducted, as to make it merely an instrumentality, conduit, or adjunct of another corporation. *It is not enough, however, that shareholders in the corporation are identical.* Nor is it enough that one corporation owns shares in the

other, and that they have interrelated. In order to warrant treating them as one it must further appear that they are the business conduits and the *alter ego* of one another."

Section 46, "EVASION OF STATUTORY OBLIGATION." "Where the corporate form of organization is adopted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporate concept and look at the substance and reality of the matter."

The author then goes on to point out that this has been applied in cases where railroad companies have attempted to circumvent the "Commodity Clause" of the Hepburn Act by organizing dummy corporations to sell the coal owned by the railroad company.

We will briefly discuss the question of fraud, and in doing so we call the court's attention to the fact that practically all the cases are decided upon the theory that one of the corporations was used as a cloak to disguise the fraudulent acts of the other corporation. The decisions are practically uniform to the effect, as stated by Fletcher and quoted above, that "It is not enough, however, that shareholders in a corporation are identical".

Richmond & I. Const. Co. v. Richmond etc. Co., 68 Fed. 105;

State ex rel. Tacoma v. T. R. & P. Co., 61 Wash. 507;

Pullman Palace Car Co. v. Missouri Pac. Co., 115 U. S. 587, 29 L. Ed. 499.

Oregon Short Line R. Co. v. Postal Tel. Cable Co., 111 Fed. 842, Ninth Circuit.

The above cases also discuss the question of agency. Judge Gilbert, in the case of *Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, used the following language in speaking of two corporations where it was claimed that *one of the corporations had no separate existence from a New York corporation, "and that all its expenses were paid and its business policies dictated by the latter; and that the sole purpose of the organization is to enable the New York corporation to exercise in the State of Idaho the right of eminent domain . . . ."*

"Its right to maintain the present suit is not abridged by the fact that the stock subscribed had not been paid for, and that the majority of the stock was owned by another corporation which conducted its business and controlled its movements. *Day v. Telegraph Co.*, 66 Md. 354, 7 Atl. 608; *Lower v. Railroad Co.*, 59 Iowa 563, 13 N. W. 718; *Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.), 61 S. W. 864, 51 L. R. A. 936; *Exchange Bank of Macon v. Macon Const. Co.*, 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800. In the case last cited it was held that the fact that 'one corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical; on the contrary, they are separate and distinct legal entities.' "

In *Commonwealth v. Muir*, 186 S W. 194, the court said that "it is only in case of bogus or dummy corporations, where it is necessary to disregard the pretended corporations in order to circumvent fraud, that courts will ignore" the rule as to corporate entity.

In re Watertown Paper Co., 219 Fed. 827, it was said: "It requires a strong case to induce a court of equity to consider two corporations as one on account of one owning all the capital stock of the other." In *Pittsburgh & Buffalo Co.*, 232 Fed. 584, 587, in denying the claim that one of the corporations involved was liable for a debt of the other the court said:

"The mere fact that the stockholders in two or more corporations are the same, or that the corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one so as to make a contract of one corporation binding upon the other, where each corporation is separately organized under a distinct charter . . . True, the legal fiction of distinct corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted 'as to make it only an adjunct or instrumentality of another corporation' ".

See, also, *New York Trust Co. v. Carpenter*, 250 Fed. 668.

Corsicana National Bank of Corsicana v. Johnson, 251 U. S. 6894, 64 L. Ed. 141, is a case to which we call the court's particular attention, because of the fact that Mr. Justice Pitney discussed at considerable length this question of the identity of a corporation. The facts are set forth in an opinion, in part as follows:

"A brief account of the relations between these two corporations, and of their dealings respecting the notes in question, becomes material. The loan company was organized in the month of May, 1907, under the laws of the State of Texas, with $50,000 capital stock and with stockholders and directors identical with those of the bank. The capital of the company was subscribed for and paid out of special dividend declared by the directors of the bank for the purpose, and each stockholder had the same proportion of stock in the company as in the bank. The purpose of the new corporation, as declared in its charter, was the 'accumulation and loan of money'. Defendant testified: 'The purpose of the loan company, a state corporation, was to take such paper as the bank could not handle. It was organized by the stockholders of the bank and paid for out of the earnings of our bank. . . . The loans of the loan company were largely real estate loans. It was to help out the bank in every possible (way)'. From the organization of the company in the spring of 1907 until the spring of 1909, defendant was a director and active in the management of the com-

pany as well as of the bank. He testified that the stockholders of the two corporations were identical, and continued to be so during the entire period just mentioned; that 'whenever there was a sale of bank stock it carried with it that particular shareholders' stock in the loan company'. During the same period the two corporations had the same president, vice-president and directors, while the assistant cashier of the bank was secretary of the loan company."

Under the above statement of facts the court held that "notwithstanding the identity of stock ownership and their close affiliation and management, for some purposes, they must be regarded as separate corporations, for instance, as being capable in law of contracting with each other. See *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 372, 373, 375, *et seq.*, 34 L. Ed. 363, 367, 368, 10 Sup. Ct. Rep. 1004."

And in the Nashua case just cited, the court held that where two corporations have the same stockholders and their business is conducted by the same directors, the separate identity of each as a corporation is not thereby lost, and numerous cases cited therein.

It cannot be argued that the building company was the *alter ego* of the bank, because under the laws of this state the building company had no authority to engage in any part of the banking business conducted by the bank. The bank was organized under a special charter authorizing it to do a banking

business under the laws of the State of Washington, and qualified as such. On the other hand, the building company was organized for no such purpose whatever, and the question of agency is a far-fetched argument not supported by any facts in evidence.

Under no theory of corporate identity can the bank be held for the acts of the building company, but, on the contrary, contracts and business transactions between those two companies are valid contracts and transactions, and under no consideration can the debts and obligations of the building company be charged to the bank.

There was a contractual obligation on the part of the building company to place the $600,000.00 mortgage and the directors of the bank consented to the sale of its land only upon express condition that this be done. The lien claimants knew that the money was to be raised for financing the building partly by means of this mortgage, and it must have been contemplated by all of them and known by all of them that this mortgage would be prior to their liens if the necessity arose for relying upon their lien rights. The recording of the mortgage was sufficient notice to put all of the lien claimants on inquiry, if any of them did not have actual knowledge of the facts and circumstances, and had they made inquiry they would have found a valid mortgage to the extent of $600,000.00 given for the purpose of securing the amounts of money as needed to pay them as the

work advanced. The money was furnished and the lienors reaped the benefit thereof. What concern of theirs is it, then, in whom the benefit of this mortgage redounds? The company gave it for an honest purpose, not to secure an antecedent debt, as stated in the opinion; the mortgage was delivered to a third person for the express purpose of raising the funds and a mortgage given for that purpose is valid from its inception. "A mortgage delivered to a third person without consideration, in order that he may procure money thereon for the mortgagor, is valid in the hands of such third person's assignee for the money paid therefor by the latter, although the former fails to pay over the money to the mortgagor."

Rogart v. Stevens, 115 A. S. Rep. 627;
Thompson v. Humbolt S. & L. Co., 9 Atl. 511.

When the building company failed to place this mortgage and it was necessary to procure money to pay labor and materialmen and contractors, the bank furnished the money and took an assignment of the mortgage. It fulfilled the purpose for which the mortgage was given. From the equity standpoint, would any injustice result from the company's causing the transfer of this mortgage to one who carried out its purpose? On the other hand, would it not be inequitable to give the lienors the benefit of these advancements and allow them to deny the force of this mortgage with notice of which they became creditors? We maintain that the court of

equity will preserve all of the equities of the bank in this transaction and will apply its doctrine of subrogation, so that the equities of the bank in the entire transaction will be preserved.

"Subrogation is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it."

25 R. C. L. 1312 and citations.

"It has long been a branch of equity jurisprudence. It does not owe its origin to statute or custom, but it is a creature of courts of equity, having for its basis the doing of complete and perfect justice between the parties without regard to form. It is a doctrine, therefore, which will be applied or not according to the dictates of equity, and good conscience, and considerations of public policy, and will be allowed in all cases where the equities of the case demand it. It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked whenever justice demands its application, in opposition to the technical rules of law which liberate securities with the extinguishment of the original debt. The right to it depends upon the facts and circumstances of each particular case, and to which must be applied the principles of justice . . . and the expansion of the rule has so nearly covered the field that it may now be said that, whenever a court of equity will relieve against a transaction, it will do so by the remedy of subrogation, if that be

the most efficient and complete that can be afforded."

25 R. C. L. 1313-14, and citations.

"In keeping with the more liberal application of the principles of equity, the doctrine has been greatly expanded and as now applied is broad enough to cover all cases in which one person pays an obligation which in justice and good conscience ought to have been paid by another."

25 R. C. L. 1314.

In *Memphis L. R. R. Co. v. Dow*, 120 U. S. 287, 7 S. C. 842, 30 U. S. (L. Ed.) 595, Justice Harlan says:

"The right of subrogation is not founded on contract; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties."

VALIDITY OF THE PURCHASE MONEY MORTGAGE.

We have heretofore pointed out to the court in several places in our arguments that the building company agreed to deliver to the bank $350,000.00 worth of its mortgage bonds, the same to be part of a bond issue to be placed upon the property to assist in the construction of the building. It was understood by everybody that the building would cost in excess of one million dollars; that this $600,000.00 would be entirely inadequate to finish the construc-

tion. The building company was to deliver these bonds within four months from the date of the agreement, pursuant to which it obtained a warranty deed to the property. The four months elapsed and the bonds were not executed or delivered as agreed, nor were they ever executed. The bank parted with its title to property conservatively valued at $350,000.00. On the premises conveyed there was a six-story office building and the bank was occupying a portion of this building for its banking quarters. The evidence shows that it was represented to the officers of the bank that the bonds could easily be placed.

When the bank was taken over for liquidation by the State of Washington, it was found by the banking commissioner that the bank had parted with its assets, which were formerly carried in the bank's returns to the State of Washington as an asset of $280,000.00. On ascertaining these facts the commissioner asserted his right under the transaction, and attempted to protect the interests of the creditors of the bank by asserting a purchase money mortgage.

We have argued this matter at such length it would be merely reiterating our former arguments to again discuss the equities bearing upon this transaction. We believe that the bank commissioner is entitled to have this $350,000.00 item treated as a purchase money mortgage, and foreclosed as such to be subrogated to rights under the $600,000.00

mortgage. It seems inequitable that the bank should be held to have lost each and every one of its equities in the property, merely by virtue of the fact that it had executed a warranty deed to the premises, when none of the terms or conditions of the contract pursuant to which it warranted title were complied with. Would it not be a travesty on justice to compel the bank to pay off a $70,000.00 mortgage, bought by a state official in the liquidation of the bank's affairs, on the theory that he was merely performing a legal duty, and at the same time hold that the building company should be entirely exonerated from each and every one of its obligations to pay for the property and to perform those conditions and agreements which it had lawfully obligated itself to perform? We do not believe that a court of equity will permit any such results to obtain, and feel confident that the bank will be protected to the full extent of the agreement it had with the building company.

EFFECT OF ARBITRATION CLAUSE IN McCLINTIC-MARSHALL CONTRACT.

We call the court's attention to the fact that the complainant in this action does not stand in a position that commends it to a court of equity. The very apparent reason for prosecuting this action in the Federal court was an attempt to evade the rulings of the State court with reference to its arbitration agreement. The contract between the complainant

and the building company contained a valid and binding arbitration clause. It was conceded during the trial of the case, and will undoubtedly be conceded here, that the arbitration clause contained in the standard printed form prepared by the McClintic-Marshall Company was a binding and enforcible obligation in both the States of Pennsylvania and Washington. We will, therefore, cite no authorities from either of those two states. A controversy arose over several items involved in the contract, the building company refusing to pay certain amounts due owing to said breaches. McClintic-Marshall Company could not enforce its lien in the state courts of the State of Washington, without complying with the arbitration clause. In fact, it seeks to prosecute its action in the expectation that it may prevail upon the Federal Courts to excuse it from compliance with its arbitration agreement. A court of equity will not permit a party to select its own forum, but will restrain the citizens of another state from attempting to avoid the obligations of its contract by resorting to a selected forum. We call the court's attention to the following case:

Cole v. Cunningham, 133 U. S. 107, 23 L. Ed. 538.

We therefore submit that the complainant is without any right in equity to prosecute its foreclosure proceedings, and the court erred in permit-

ting the claim of the complainant to be adjudged prior to that of any of the mortgages in controversy.

EFFECT OF LIEN WAIVERS.

The contracts of the Tacoma Millwork Supply Co., E. E. Davis & Co., Edward Miller Cornice and Roofing Co., Ben Olson Co. and other lien claimants had valid and binding waivers of lien claims and agreements not to file lien claims. This was done, as we before indicated, for the purpose of permitting the $600,000.00 mortgage to be placed upon the premises prior to any lien claims. Such an agreement was valid and binding.

Holm v. C. M. & P. S. Ry. Co., 59 Wash. 293.

The lien claimants seek to avoid the effect of their lien waivers, nevertheless elected in open court to treat their contracts as entire and indivisible. In other words, seeking to secure their rights under their contract and still avoid that portion of the contract in which they expressly waived their liens. This procedure cannot be sustained. There were no misrepresentations shown in the evidence sufficient to justify a finding that the representations were fraudulently made. They were not made with any intention to deceive the lien claimants, but were made honestly and in the full belief that they were true. Inasmuch as the receiver has appealed from this portion of the decree we do not wish to further argue the matter, relying upon the decision of the

court in the receiver's appeal. We wish merely to state, in this argument, that the lien claimants who agreed to waive their liens did so for the express purpose of protecting the $600,000.00 mortgage in controversy, and it would be inequitable to now subject that mortgage to the liens referred to.

In concluding this brief, we submit that a marshalling of the equities incident to the entire transaction demands that both of the mortgages be declared valid and prior to all other lien claims; that the $70,000.00 mortgage be decreed a first and prior lien and that the bank should not be relegated to the status of a mere general creditor, or worse.

Respectfully submitted,

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No. 3953

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a corporation,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, et al.,

Appellees.

Brief of Appellant Washington Brick, Lime & Sewer Pipe Company

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F. D. MONCKTON

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Brief of Appellant Washington Brick, Lime & Sewer Pipe Company

Statement of the Case

On February 28th, 1920, the Washington Brick, Lime & Sewer Pipe Company, a corporation, entered into a contract, in writing, with the Scandinavian American Building Company, a corporation, to furnish terra cotta for a proposed building for the Scandinavian American Bank at Tacoma, in conformity with plans and specifications, at a price of $109,000.00.

Terra cotta is used for facing buildings and is made from clay, according to special designs of the

architect and has very little, if any, value except for use in the structure for which it is made.

The process of manufacture of terra cotta is substantially this: Drawings are furnished by the architect showing the design and size of each piece and its position in the building. From these drawings the manufacturer makes a schedule of the different pieces giving each a number. A plaster paris mold is made for each unit. Plastic clay is pressed into it and after setting a sufficient period the mold is taken apart and placed in a dry room. After drying a coat of glazing is put on, after which it is placed in the kilns and subjected to intense heat. It is then assembled, fitted and marked, showing its position in the building according to the drawings.

Appellant immediately entered upon the execution of its contract. Material of the value of $58,657.50 according to contract price, was shipped to Tacoma. The remainder was in various stages of completion; $10,350.00 in value, was burned but not fitted; $5629.05 pressed; $13,010.31 molded and $34.02 in drafting. (Tr. p. 796).

The first shipment was made September 17th, 1920, and the last Januray 13th, 1921. Shortly thereafter, the Scandinavian American Bank of Tacoma failed and work on the building suspended.

At the date of the failure of the bank a large amount of labor had been expended and material

used in the structure and the steel frame practically completed.

A payment of $20,000.00 was made on account August 13th, 1920.

In due course, appellant executed and caused to be filed according to law, a notice of claim of lien on the real estate on which the improvements were made.

A cross-complain was filed to foreclose this lien, resulting in a decree denying appellant a right of lien but giving judgment against the building company for damages for $72,511.13, interest and costs (Tr. p. 519).

From this decree and the refusal of the Court concerning matters hereinafter assigned as errors, the Company has appealed.

Assignments of Error

I.

The District Court erred in refusing to grant to the Washington Brick, Lime & Sewer Pipe Company, a judgment and decree awarding a statutory lien for terra cotta fabricated and shipped to Tacoma, Washington, and stored ready for delivery and use, for the reason that under the statutes of the State of Washington, in such cases, this appellant was entitled to a statutory materialman's lien therefor.

II.

The District Court erred in refusing to grant to the Washington Brick, Lime & Sewer Pipe Company, a judgment and decree awarding a statutory lien for terra cotta fabricated and stored at its plant, for the reason that under the statutes of the State of Washington, in such cases this appellant was entitled to a statutory material man's lien therefor.

III.

The District Court erred in holding that no part of the terra cotta fabricated by this appellant was delivered to the Scandinavian American Building Company, for the reason that the same is contrary to the evidence in the case.

IV.

The District Court erred in holding that the title to the terra cotta fabricated by this appellant was at all times vested in it, for the reason that the same is contrary to the evidence in the case.

V.

The District Court erred in giving and granting to all of the lien claimants (except the laborers named in paragraphs IV and V of the decree) to whom statutory liens were decreed, a status prior and superior to this appellant, for the reason that under the evidence in the case and the law of the State of Washington, this appellant was entitled to have its claim, for material fabricated, established

as of the same rank as the material men's liens which are decreed.

VI.

The District Court erred in holding that, under the statutes of the State of Washington, no lien can be established or decreed, except for material delivered upon the premises of the building, for the reason that the statutes and laws, of the State of Washington, do not prescribe that delivery must be made at any specified place.

VII.

The District Court erred in failing and refusing to decree that the Scandinavian American Bank and the Scandinavian American Building Company were one corporation in equity, for the reason that under the evidence in the case, the corporations were identical.

VIII.

The District Court erred in not allowing to this appellant an attorney's fee, in at least the sum of $5,8000.00, as a part of the judgment in its favor.

IX.

The District Court erred in granting a judgment in favor of J. P. Duke, as Supervisor of Banks for the State of Washington, on account of monies paid in procuring the assignment of the mortgage, referred to in paragraphs thirty-four of the judgment, in the sum of $72,366.35, and interest

amounting to $4,293.73, for the reason that such judgment is contrary to the law and the evidence.

X.

The District Court erred in granting a judgment in favor of J. P. Duke, as Supervisor of Banks for the State of Washington, on account of monies advanced by the Scandinavian American Bank to and for the benefit of the Scandinavian American Building Company, in the sum of $232,-094.42, and interest amounting to $19,136.62, for the reason that such judgment is contrary to the law and the evidence.

XI.

The District Court erred in denying appellant's claim of lien, for the reason that the judgment operates to deprive this appellant of its property without due process of law.

In this argument, Assignments of Error, I to VI, will be grouped.

These assignments involve questions of law.

There is no material dispute of fact.

The witness M. L. Bryan, Superintendent of the Terra Cotta Department of Appellant, testified:

Mr. Sherman Wells was superintendent of construction of the building, under Mr. Frederick Webber, architect, who resided at Philadelphia. He visited appellant's plant in June, 1920. At that time some of the material was manufactured and ready for shipment and was stored at the plant.

At that time, Mr. Wells stated that he desired to assemble all material for the building in Tacoma so that he would have no delay with setting the terra cotta. He stated he wanted the material at Tacoma so that they could have access to it as he needed it. As the material was shipped, a checking list was made for each car of material as it left the factory and a duplicate copy sent to the Building Company at Tacoma. Mr. Wells stated that he could not take the material at the building as there was no room to store it. (Bryan Tr. p. 796).

After this visit, Mr. Bryan again talked with Wells regarding a place to store the material and Mr. Wells arranged a meeting with a transfer man to adopt plans to store the same.

The object of having the material at Tacoma was to avoid delay in case of breakage.

The material was finally placed at the end of the Great Northern Railway Company's freight sheds, in Tacoma. It is not practical to store material of this character at the building site because of its bulk (Exhibits 131-132-133). It would have been impossible to carry on other construction work and at the same time receive the material at the building (Bryan Tr. pp. 797-8).

This material was shipped to Tacoma and consigned to the Local-Long Distance Transfer Co. They took care of it for the Washington Brick,

Lime & Sewer Pipe Co., transferring it to the storage yards. We employed them and paid the expense and I think our Company paid the rent on the storage yard (Bryan Tr. II. p. 805).

A. B. Fosseen, President of the Appellant testified:

I had conversations with representatives of the Building Company in reference to delivery of materials at Tacoma. Mr. Wells was greatly perturbed over the non delivery of steel and feared he was going to be delayed on the terra cotta.

In November, Wells said:

> "Mr. Fosseen, now rush this terra cotta here as fast as you can and I will see that it is taken care of, that it is checked, and you can't crowd me too fast. I want the material here as fast as I can get it." (Fosseen Tr. II, p. 810).

Again, in December, Mr. Wells stated that as the material was received it was checked by a representative of the building company. The checking consisted of the placement so that it would be easy to move it to the building, tier by tier, or story by story. (Fosseen Tr. II, p. 811.)

There is no question of authority in Wells (Exhibit 138, Tr. II, p. 812).

Mr. Wells had authority to move the terra cotta without any order from the manufacturer. The terra cotta was there at his disposal at any time without any payment and without any reservation whatsoever. (Fosseen Tr. II, p. 824.)

Willis E. Clark, with reference to storing of material at Tacoma, stated:

> "I reported it to Mr. Wells, explaining to him that negotiations had taken place, and asked if the conclusion of such an arrangement would be satisfactory to him and entirely in accordance with his desires. He stated it would be so and then made arrangements with the transfer company and filed formal application with the railroad company for the space, and they permitted us to use it.
>
> "I told Mr. Wells that his instructions to the transfer company were to haul the material to the building any time Mr. Wells might call for it.
>
> "Mr. Wells had a man on the ground checking some of the material as it came from the cars."

Albert Glazier testified:

> "I received checking lists from the transfer company and checked off the material as it arrived here in the yard. At the time I received the checking lists a duplicate set went to Mr. Wells. Once or twice Mr. Wells came down and found a piece that did not suit him. I made a note of it and had it replaced. After the car was unloaded, I went up with my checking list to Mr. Wells. (Glazier Tr. II, p. 832.)

This, in substance, is all of the material evidence bearing upon the status of the material made and shipped by appellant.

This appeal involves the construction of the mechanics' lien statute of the State of Washington.

Section 1129, Rem. Comp. Stat. of Wash., 1922, provides:

> "Every person performing labor upon or *furnishing* material *to be used* in the construction, alteration or repair of any * * * building, * * * has a lien upon the same for the * * * material furnished."

The trial court denied appellant a lien upon the premises because the material was not delivered at the premises.

We contend this to be a narrow and limited interpretation of the language used and contrary to the provisions of the lien statute itself, which provides that it shall "be liberally construed to a view to effect their objects." Sec. Rem. 1147, Comp. Stat. 1922.

Furthermore, it is not consistent with the methods necessarily employed nor the physical conditions surrounding the construction of buildings in the larger cities of the state. It must be apparent from casual observation that in the construction of a sixteen story building in any of the cities of Washington, it would be physically impossible to assemble all classes of materials at or upon the premises. From the earliest times the Supreme Court of Washington has given the language of this statute a broad and liberal construction.

In *Huttig Bros. Mfg. Co. vs. Denny Hotel Co.*,

6 Wash. 122, it was held that the manufacturer of material, especially designed but in part not used in the building, was entitled to a lien for both the part used and the portion unused.

In the case of *Gould vs. McCormick*, 75 Wash. 61, 47 L. R. A. (N. S.) 765, a lien was allowed under this statute for services of an architect in preparing plans and specifications. The court there says:

> "While the decisions upon this question are by no means harmonious, the great weight of authority as well as the better reason appears to support the view that the lien exists where the language of the statute is general. It will be noted that the language of the statute above quoted is general and comprehensive in its terms. Had the legislature intended it not to be sufficiently broad to include the labor of the architect in preparing plans and specifications, according to which the building was constructed, and not superintending the construction thereof, it would doubtless have made use of more restrictive terms."

In the case of *Western Hardware & Metal Co. vs. Maryland Casualty Co.*, 105 Wash. 54, an action was brought by a contractor against a surety company on a bond, filed pursuant to Sec. 1159, Rem. Comp. Stat. 1922, which requires public corporations to exact a bond from contractors on public works conditioned to pay "any person or persons performing such services or furnishing material to any sub-contractor", etc. The facts in that case

are that a contract was entered into with School District No. 1, by which the contractor agreed to furnish the material for and install a heating and ventilating plant in the West Queen Anne school house in the City of Seattle. The contractor sublet the furnishing and installing of the sheet metal work of the heating plant to the Zimmerer Manufacturing Company. The sub-contractor was the owner of and conducted a sheet metal shop in Seattle wherein it pressed and worked sheet metal into such a form as was necessary for whatever jobs they might have on hand. The sub-contractor, not having sheet metal on hand for the performance of the sub-contract, purchased from the Western Hardware and Metal Company the sheet metal for the purpose of performing the sub-contract with the understanding that the sheet metal so furnished was for the sub-contract and was to go into and be a part of the heating and ventilating plant. The sheet metal so purchased was delivered to the sub-contractor at the shop. Notice was given to the principal contractor of the delivery of this material and that the surety would be held for the purchase price therefor. Only a portion of the material so furnished and delivered actually went into and became a part of the structure. Before completing the contract the sub-contractor went into bankruptcy. Claim was filed by the materialman against the bond. It was contended

by the bonding company that it was not liable for the sheet metal furnished to the sub-contractor, which was not actually used in the construction of the heating and ventilating plant. Counsel for appellant invoked the law announced in some of the lien decisions, holding that actual use of the material in the construction of the building is indispensable to the creation of a lien right.

Justice Parker in a well considered opinion, in which the decisions are exhaustively reviewed, sustained the right of lien for the whole of the material delivered at the shop of the contractor. The opinion was concurred in by all of the judges and later, upon a rehearing *en banc*, a majority of the court still adhered to the opinion theretofore filed. The court says:

> "It would seem, therefore, that since our lien statute secures by a lien payment for 'furnishing material to be used in the construction,' etc., and our bonding statute provides for the securing by bond the payment of 'sub-contractors and materialmen and all persons who shall supply such person or persons or sub-contractors with provisions or supplies for the carrying on of such work', there is an analogy between these statutes in so far as we are here concerned with the question of the necessity of the material furnished by respondent going into the structure of the plant, in order to give respondent the right of recovery upon the bond. We are not here concerned with provisions and

supplies which are not intended to go into the structure but which are consumed in carrying on the work, the payment for which our bond statute contemplates securing by the bond, but which our lien statute does not secure. These observations, we think, render it plain that the mechanics' and materialmen's lien decisions are as applicable and helpful, in our personal inquiry, as bond decisions."

The court further says:

"While we concede that the authorities are not harmonious upon the question of the necessity of material actually going into and becoming a part of the structure in order to support a lien right, which is the particular question we are now considering, we think the decided weight of authority is in harmony with the early holding of this court in the *Denny Hotel* case and the cases from other courts above quoted."

This view of the law finds support in the following authorities:

Trammel vs. Mount, 68 Texas 210, 4 S. W. 377, 2 Am. St. 479;

Watts vs. Whittington, 48 Md. 353;

Nelson et al vs. Iowa East R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124;

Burns vs. Sewell, 48 Minn. 425, 51 N. W. 224;

Crane Co. vs. U. S. Fidelity & Guaranty Co., 74 Wash. 91;

Phillips, Mechanics' Liens, 3rd Edition, p. 260, 2 Jones, Liens, 3rd Edition, Sec. 1329.

Decisions of other courts are in harmony with this construction of the Washington Lien Statute.

> *John Paul Lbr. Co. vs. Hormel*, (Minn.) 63 N. W. 718;
>
> *Berger vs. Turnblad*, (Minn.) 107 N. W. 543.
>
> *Thompson-McDonald Lbr. Co. vs. Morawetz*, (Minn.) 149 N. W. 300.

A true interpretation of the word "furnishing" as used in the statute does not necessarily mean "delivery" at or upon the premises.

The case of *McEwen vs. Montana Pulp & Paper Co.*, (Mont.) 90 Pac .359, involves the construction of the mechanics' lien statute of the state of Montana. The court there says:

> "Coming then to the main question in the case, we find that our statute, relating to mechanics' liens (Section 2131 of the Court of Civil Procedure) reads in part as follows: 'Every person wishing to avail himself of the benefits of this chapter must file with the County Clerk of the county in which the property is situated, and within ninety days after the material or machinery *has been furnished*, a just and true account of the amount due him', etc.
>
> We are to determine when this machinery *was furnished* within the meaning of the law."

The court then states the terms of the contract, which provided that certain machinery was to be shipped f. o. b. cars, Wellsville, New York, in knockdown form. On arrival and destination the

shipper was to be notified and would then furnish men to rivet the tanks together. Shipment of all materials, for which a lien was claimed, was made from Wellsville, New York, on or prior to June 6, 1900. The materials actually reached Manhattan on or about the 18th day of June. The invoice for the same was dated, Wellsville, June 8, 1900.

The court concludes:

> "We find, therefore, that this material having been furnished on or before June 6, (the date of shipment from Wellsville, New York) more than ninety days prior to September 14, when the claim for lien was filed, the mechanics' lien law was not complied with and the lien did not attach."

In the case of *Tibbets vs. Moore*, 23 Cal. 208, it was held that the lien of a materialman accrues at the time he has the materials, which he has contracted to furnish, ready for delivery at the place where he has agreed to deliver them. The court said:

> "The question is whether or not the word 'furnished', as used in the statute, means 'delivered at the building', in the construction of which the materials are furnished. *We think that such is not its reasonable construction.*"

See also:

Watson Coal & Mining Co. vs. James, 72 Iowa 184, 33 N. W. 622;

Congdon vs. Kendall, 53 Nebraska 282, 73 N. W. 659.

In the latter case it was held that, under a contract to make certain machinery and deliver it f. o. b. cars at a designated place for a stipulated sum the machinery is furnished with the meaning of the Nebraska mechanics' lien law, when it is delivered, in accordance with the contract, *on board the cars* at the place named, without expense to the purchaser; and to obtain a lien therefor, the claim for a lien must be filed within four months from that time.

See also:

Manufacturing Co. vs. Hunter, 15 Nebraska 32, 16 N. W. 759;

King vs. Cleveland Shipbuilding Co., 50 Ohio State 320, 34 N. E. 436.

In the Minnesota case, *Lamoreaux vs. Andersch*, 150 N. W. 908, it was held that an architect who furnishes plans and specifications for the construction of a building is entitled to a lien upon the building and land upon which it is constructed, though he does not supervise the construction.

The statute under consideration in that case afforded a lien to "a person contributing * * * material to the improvement of real estate," etc. Sec. 7022 Gen. S. L. 1913.

The court in its opinion said:

> "We think the plaintiffs would have been entitled to a lien if their plans had been used in the construction of the building on the premises. Is this right to a lien lost

when the owner, through no fault of the architect, does not use the plans or make the contemplated improvemen? Liberal construction of the lien statute is the settled policy of this state."

See also:

Minneapolis Sash & Door Co. vs. Hedden, 154 N. W. 511;

State Loan Company of Minneapolis vs. White Earth, Etc. Co., (N. D.) 157 N. W. 834;

North Land Pine Co. vs. Northern Insulating Co., (Minn.) 177 N. W. 635, p. 637.

Judge Cushman in his memorandum opinion after quoting the statutes says:

"While it may be true that in a controversy solely between the materialman or contractor or sub-contractor and the owner, the owner will be estopped to deny the lien because of failure to deliver the material, where any act of his or act with which he may be charged has in any way caused such failure, yet when the substantial controversy is as it is here, between the lien claimants, no such rule should be applied. While the contractor or sub-contractor may, where material has been delivered to him for work upon it by him, be considered in some respects as agent of the owner, the owner is not the lien claimant's agent nor will the lien claimant himself be considered the agent of the owner in respect to his own lien claims where he claims to have retained the material at his shop or factory for the purpose of completing necessary work upon it, or be-

cause the owner was not prepared to receive
it at the building being constructed."

This reasoning is fallacious in view of present day methods in preparation for construction of large buildings.

Every contractor, sub-contractor, or materialman was obliged to and did examine the plans and specifications as a whole for this building. Each knew the kind and character of material to be delivered by the other. Each well knew the orderly sequence of the delivery and use of various classes of material which entered into the construction of this building. For example, the manufacturer of terra cotta knew that before its material could be used, the steel had to be delivered and in place, and in turn the manufacturer of millwork knew that its material could not be used until the building had been enclosed and was in the last stages of completion.

There is no reasonable basis, therefore, for the theory that a lien may be had for material "furnished" as against the owner but not as against other claimants whose material had been first used.

The testimony of all of the witnesses for appellant, heretofore quoted, shows that the terra cotta placed on the property of the Great Northern Railroad Company at Tacoma was shipped at the request of the superintendent of construction of the building. While it is true that the manufacturer agreed

to pay the expense of the hauling of the material from the railroad yards to the building, yet, as stated by the witness Fosseen, president of appellant company: "Mr. Wells had authority to move the terra cotta without any order from the manufacturer. The terra cotta was there at his disposal at any time without any payment and without any reservation whatsoever." (Tr. II., p. 824.)

It had been placed on the railroad property by and with his advice and consent and only for the reason that it was physically impossible to receive it at the building or on the premises.

Let us assume that it had been placed in the street adjacent to the property or on a vacant lot across the street under like circumstances. Would it be contended with any measure of success that the manufacturer had not furnished the material to be used in the construction of this building? If, under such conditions, the manufacturer would be entitled to a lien, is there any reasonable basis for the claim that he would not be entitled to such lien because all of the property within four or five blocks of this structure was occupied by buildings and the place where the material was stored was the nearest and most convenient space available, and so determined to be the most convenient place by the superintendent of the building himself?

The theory of the cases heretofore cited, which have sustained the right of lien for materials pre-

pared but not actually brought to the premises and used in the construction of the improvement, is well stated in the case of *Trammel vs. Mount, supra,* as follows:

> "The language of the statute does not require such a delivery nor does it require that the material should actually enter into the construction of the improvement. To furnish materials for the construction of the house and to furnish materials which enter into its construction are very different things. To give our statute the later construction is to strain its words beyond the usual meaning, and this should not be done for the purpose of depriving mechanics and others of the protection which the statute was evidently designed to give them."

The District Judge in his memorandum opinion states:

> "The court, however, finds that the shipment was made by claimant, rather to avoid the higher freight rates imminent than to accommodate the building company, although it may have been in part for the later purpose, and that it never passed into the possession and control of the building company."

We have searched the record in vain for a word of testimony from any party to the case that will support this statement. On the contrary the testimony of all of the representatives of appellant stands absolutely uncontradicted and undenied in any respect touching the reason for the delivery of the material at Tacoma.

The District Judge denied the right of lien to appellant entirely upon the authority of the case *of Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74. The facts in that case are:

The Holly-Mason Hardware Company, doing business at Spokane, some distance from the place where the buildings were being constructed, delivered materials to a common carrier, some times a railroad company and other times an express company, for transportation to the shipping station nearest the site of the building, some two and a half miles therefrom. The actual receivers of the goods were usually draymen or their employes, and respondent was unable to show that more than a small quantity of them actually reached the building. Under these circustances, the right of lien was denied.

No reference is made in this opinion to the case of *Western Hardware & Metal Company vs. Maryland Casualty Co.*, 105 Wash. 54, and there is no suggestion by the court of any intention to overrule the rule of decision in that case. The materials ordered and shipped by the Hardware Company were not especially designed and there was no showing that they were intended to be used for the building under construction.

Under the facts of that case, Judge Fullerton rests his decision on the fact that failure to show more than delivery to a common carrier might re-

sult in the grossest frauds on the part of contractors and materialmen and is not necessary for the protection of bona fide material men.

There is no question of fraud in this case or the bona fides of the delivery of the material involved in this case at Tacoma, subject to the control and order of the superintendent of the building. It can hardly be contended that Judge Fullerton did not have the *Western Hardware & Metal Company case* in mind, for he partciipated in its decision.

In the *Holly-Mason Hardware Company* case, no reference whatever is made to any of the long list of cases referred to and relied upon in the *Western Hardware & Metal Company* case, except the Washington case of *Gate City Lumber Company vs. Montesano*, 60 Wash. 586, and the earlier opinion disposes of that case with the observation that a large part of the lumber was diverted and "there was no understanding and no necessity for the lumber being delivered at a shop or place where the contractor or sub-contractor was specially preparing his material before being placed in the structure." (105 Wash. 68.)

Application of Payment

A payment of $20,000 was made in August, 1920, on account.

The District Judge found material of the value of $58,657.50 finished, shipped and stored at Tacoma, and the uncontradicted testimony of appel-

lant's witnesses was that material of the value of $29,023.28 remained at the plant.

If it shall be determined that appellant is entitled to a lien for the material shipped to Tacoma and not for the work expended upon the material which remained at its plant, the question of the application of the $20,000 payment becomes important.

The authorities seem to be uniform that where neither party makes a specific application, a court of equity will make the application to the unsecured in preference to the secured portion of the debt.

By the common law in most of the states of this country, while there are cases laying down the rule that the creditors should be preferred, the general rule is that the court will make the application in such a manner, in view of all of the circumstances of the case, as is most in accord with justice and equity and will maintain the rights of both creditor and debtor. (30 Cyc. 1241.)

It is generally held that the court will apply a payment to an unsecured debt in preference to one for which the creditor is secured and a debt for which the security is most precarious, where a creditor holds more than one security.

30 Cyc. 1246;

21 R. C. L. 100;

Monson vs. Meyer, 100 Illinois 105, 60 N. E. 83;

Barbee vs. Morris, 221 Illinois 382, 77 N. E. 589.

In *Casey vs. Weaver*, (Mass.) 66 N. E. 372, seeking to enforce a mechanics' lien, where it appeared that the lien creditor was to furnish labor and material on an entire contract for an entire contract price, and be also paid a certain sum in partial payment, it was held that the partial payment was a payment under the contract and not a payment for labor or materials. It was also held, however, that the worth of the labor performed by the petitioner being less than the amount due on the contract debt after the partial payment was made, the lien could be enforced for the full amount.

In *North vs. LaFlesh*, (Wis.) 41 N. W. 633, the plaintiff's action consisted of advances made by him to pay freight chargeable to the defendant, for which he had no lien, and was for materials furnished for which he had a lien, and it was held equitable to apply cash payments which had been made on general account to the non-lienable items.

See also:

Wardlaw vs. Troy Oil Well, (S. C.) 54 S. E. 656.

Kunz vs. Tome, 9 Fed. 532;

Field vs. Holland, 6 Cranch 8;

Pierce vs. Sweet, 33 Pa. St. 151;

Foster vs. McGraw, 65 Pa. St. 468;

Howell vs. Noland, 27 Wash. 338.

Assignment No. 8

If a lien is sustained, for the material delivered at Tacoma, of the value of $58,657.50, appellants will be entitled to allowance for attorneys' fees.

Scott Henderson, Esq., of the Tacoma Bar, testified that a reasonable allowance would be $6,500. (Tr. II, p. 854.)

P. C. Sullivan, Esq., of the Tacoma Bar testified that a reasonable fee would be ten per cent of the amount of the recovery. (Tr. II, p. 853.)

Assignment Nos. 7, 9, 10 and 11

In the interests of brevity and to avoid encumbering this brief with burdensome references to authorities, we adopt the statement of the case and the unanswerable argument presented by Judge T. L. Stiles, counsel for Ben Olson Company, one of the appellants in this group of cases.

We respectfully submit that the judgment of the District Court should be reversed and that this appellant should be awarded a materialman's lien, attorneys' fees and costs.

CHARLES P. LUND,
DAVIS & NEAL,
L. R. BONNEVILLE,
Attorneys for Appellant.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

4

FORBES P. HASKELL, as Receiver of Scandinavian-American Building Company, a corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al, *Appellees*,

BEN OLSON COMPANY, a Corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, et al, *Appellees*,

BRIEF OF BEN OLSON COMPANY, APPELLANT

STILES & LATCHAM,
Attorneys for Appellant,
Ben Olson Co.

Tacoma, Wash.

Filed this............................day of February, 1923

FRANK D. MONCKTON, Clerk.

By..Deputy Clerk.

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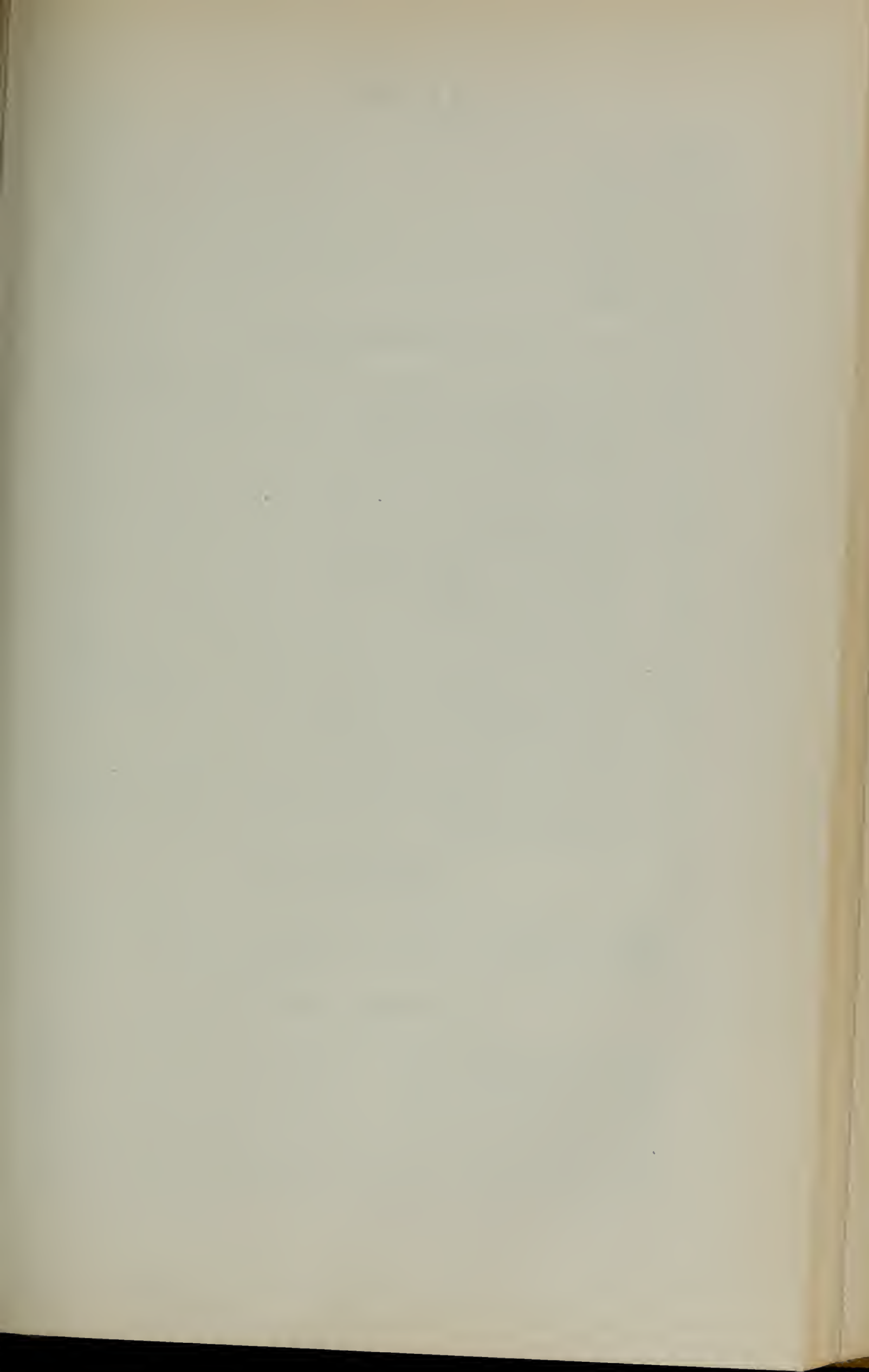

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No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of Scandinavian-American Building Company, a corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al, *Appellees,*

BEN OLSON COMPANY, a Corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, et al, *Appellees,*

BRIEF OF BEN OLSON COMPANY, APPELLANT

Statement of the Case

The action was commenced by the McClintic-Marshall Company to foreclose a material man's lien upon Lots 10, 11 and 12, in Block 1003, in the City of Tacoma, Pierce County, Washington, and was heard upon the Complainant's Amended Com-

plaint, and the Answers and Cross-Complaints or Counterclaims of the several defendants, some thirty in number. All of the defendants except the Scandinavian American Building Company, represented by its Receiver, Forbes P. Haskell, and the Scandinavian American Bank, represented by the State Bank Supervisor, J .P. Duke, were lien claimants and all, with the single exception of Ben Olson Company, were awarded judgments for various sums, and a decree foreclosing their liens. Ben Olson Company was awarded a general judgment, only. Several other defendants were awarded foreclosure decrees for part of their judgments, only, with general judgments for the remainder. This appellant complains of none of the other awards except that to the Scandinavian American Bank which was a general judgment against the Scandinavian American Building Company for $232,136.62 and interest in the sum of $19,136.62, with a rank the same as that of the appellant, (Decree Par. XXXVIII. Record p. 524).

The Pleadings

The Complainant's Amended Complaint, (Record p. 23), contained the usual allegations necessary to sustain such a cause of action.

Appellant's Pleading

Appellant's case was heard upon its Amended Answer and Cross-Complaint to the Complainant's

Amended Complaint (Record p. 290); the Answer and Cross-Complaint of the Scandinavian American Bank and J. P. Duke, Supervisor, etc., (Record p. 73; the Answer and Cross Complaint of the Scandinavian American Building Company and Forbes P. Haskell, Receiver (Record p. 323); and the Answer and Cross-Complaint of the Far West Clay Company to the Answer and Cross-Complaint of the Scandinavian American Bank, and J. P. Duke, Supervisor, (Record p. 400); said Far West Clay Company's Answer and Cross-Complaint being stipulated by all parties to be the answer and Cross-Complaint of all the other defendants, except the Scandinavian American Building Company, and Forbes P. Haskell, Receiver (Record p. 421). The Scandinavian American Building Company, and its Receiver, Forbes P. Haskell, will be hereinafter mentioned as "the Building Company", and the Scandinavian American Bank and J. P. Duke, Supervisor, will be mentioned as "the Bank".

Appellant's Amended Answer and Cross-Complaint proceed, as follows:

Paragraph I, (Record p. 292), alleged its corporate existence.

Paragraph II, (Record p. 292), alleged corporate existence of the Bank, and the official capacity of John P. Duke, as Supervisor of Banking of the State of Washington; of Forbes P. Haskell, as Assistant Supervisor in charge of the Bank in

plaint, and the Answers and Cross-Complaints or Counterclaims of the several defendants, some thirty in number. All of the defendants except the Scandinavian American Building Company, represented by its Receiver, Forbes P. Haskell, and the Scandinavian American Bank, represented by the State Bank Supervisor, J .P. Duke, were lien claimants and all, with the single exception of Ben Olson Company, were awarded judgments for various sums, and a decree foreclosing their liens. Ben Olson Company was awarded a general judgment, only. Several other defendants were awarded foreclosure decrees for part of their judgments, only, with general judgments for the remainder. This appellant complains of none of the other awards except that to the Scandinavian American Bank which was a general judgment against the Scandinavian American Building Company for $232,136.62 and interest in the sum of $19,136.62, with a rank the same as that of the appellant, (Decree Par. XXXVIII. Record p. 524).

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liquidation; also the official character of Forbes P. Haskell, as receiver of the Building Company.

Paragraphs III to VIII, inclusive, (Record p. 293 to 295), alleged character and citizenship of other defendants.

Paragraph IX, (Record p. 295), alleged amount in controversy over $3,000.00.

Paragraph X, (Record p. 296), alleged that November 1, 1919, and prior thereto the Bank was the owner of said Lots 10 and 11, Block 1003, Tacoma, and occupied the building thereon as its banking office; and that desiring to enlarge its banking facilities and provide more extensive and elaborate quarters, it employed one, Weber, an architect of Philadelphia, Pa., to prepare plans and drawings of a proposed building thereon, and subsequently said Weber prepared and delivered to the Bank plans and drawings for such building.

Paragraph XI, (Record p. 296), alleged that after receiving said plans and drawings and to avoid the appearance to the general public that it was using its resources for building purposes, the Bank caused certain of its directors and stockholders, viz: J. E. Chilberg and Gustav Lindberg to execute Articles of Incorporation of the Building Company, with a capital stock of $200,000., designating as its trustees, J. E. Chilberg, O. S. Larson, Jafet Lindeberg, Gustav Lindberg, Charles Drury, James R. Thompson and George G. Williamson,

who were, also, all the directors of the Bank, to serve for the first six months; and that said Larson, as President of the Bank subscribed for all of the Capital stock of the Building Company, except one share for each of the other trustees, to qualify them.

Paragraph XII, (Record p. 297), alleged that on February 9, 1920, the Bank purchased Lot 10, in Block 1003, from Director Drury.

Paragraph XIII, (Record p. 297), alleged that on or about March 20, 1920, the Bank, without any consideration, although its value was over $100,000, conveyed Lots 11 and 12 to the Building Company; and that thereupon the Bank, in pursuance of its said plans and in the name of the Building Company, but as its agent and trustee, entered upon the construction of a sixteen-story building, to cost in excess of $1,200,000; and that thereafter said building operations, negotiating for contracts for materials and work thereon, and all business of every kind in connection therewith, was carried on and conducted by the Principal Officers of the Bank, and all payments for materials, labor and other service were made by the Bank.

Paragraph XIV, (Record p. 297), alleged, that on or about March 10, 1920, the Bank caused the Building Company to execute and record a mortgage on said real estate to one, G. Wallace Simpson, to secure the payment of $600,000; but no consid-

eration was paid or advanced or contracted to be paid or advanced thereunder; and that on or about January 21, 1921, and after the insolvency of the Bank, it caused said Simpson, without any consideration therefor to assign said mortgage to it; and that, also, shortly after the Bank had been declared insolvent, and placed in the hands of the State Bank Commissioner, he, without any lawful authority procured an assignment to be executed to him of a certain mortgage on said real estate, to secure $70,000, and claims title thereto.

Paragraph XV, (Record p. 298), alleged that on the 27th day of February, 1920, the Bank procured its directors to enter into a contract with appellant, in the name of the Building Company, by said Drury, its President, but in behalf of the Bank, for the plumbing and heating materials of said building for the sum of $91,000, of which $1,000, was to be paid and was paid by the sale and delivery of the radiators in the old building. $90,000 was contracted to be paid by 75% of monthly estimates of labor and materials. Copy of Contract annexed, as Exhibit A. (Record p. 309).

Paragraph XVI, (Record p. 299), alleged that appellant complied with all the terms of its contract; and commencing July 1, 1920, furnished and delivered to said premises materials of the value of $24,633.07.

Paragraph XVII, (Record p. 300), alleged that appellant procured ready for delivery, and stored

in its warehouse other materials for the plumbing in said building, not adapted to any other building, of the value of $8,125.00.

Paragraph XVIII, (Record p. 300), alleged that appellant procured 86 closets complete, with fixtures, adapted to said building but not to any other, from Crane Company, and was charged therewith, parts of which closets were delivered to said building, and the remaining parts of which were stored in Crane Company's warehouse in Tacoma, of the value (remainder parts) of $6,-132.66.

Paragraph XIX, (Record p. 301), alleged that appellant procured from Crane Company certain toilet room and lavatory materials and fixtures, adapted only to said building, and charged to appellant, ready for delivery and stored in Crane Company's warehouse, in Tacoma, of the value of $12,910.76.

Paragraph XX, (Record p. 301), alleged that all of said materials and fixtures not actually delivered on said premises were procured by appellant in time and would have been delivered and put in place within the time provided by the contract, but for the fact that the construction of the building was delayed by the owners and the steel contractor thereof (complainant) and could neither be placed on the premises nor erected.

Paragraph XXI, (Record p. 301), alleged that

appellant performed labor in construction, which continued to January 15, 1921, of the value of $2,279.80.

Paragraph XXII, (Record p. 301), alleged that $13,425.56 of the $91,000 had been paid.

Paragraph XXIII, (Record p. 302), alleged that to complete appellant's contract would have cost:

In Materials	$16,691.64
In Labor	11,196.70
Total	$27,888.34

which, after deducting materials and labor already furnished and done, would have left appellant a profit of $8,029.77, but for the fact that whereas the construction of the building was proceeded with so that on the 15th of January, 1921, the steel framework was practically completed, and appellant had been able to install a small part of its plumbing and heating materials and awaited the progress of the other contractors to permit it to install the remainder thereof, when due to the failure of the Bank, the work ceased and the contract was terminated, said Bank and Building Company having failed to pay 75% of materials and labor valued at $19,050.90 theretofore on the 4th day of January certified as furnished.

Paragraph XXIV, (Record p. 302) alleged:

"That this defendant, Ben Olson Company, was, at all times ready, able and willing to proceed with said plumbing and heating work,

under said contract, and would have proceeded with and completed the same, and would have earned the said profit of $8,029.77, but for the following facts to-wit:

"The construction of said building was proceeded with, so that on the 15th day of January, 1921, the steel framework thereof was practically completed, and this defendant had been able to install a small part of the plumbing and heating materials, and awaited progress of the other contractors to permit it to install the remainder thereof, but on the 15th day of January, the said Scandinavian American [223] Bank of Tacoma, which had provided and paid the money necessary for cash payments for the construction of said building up to that time, became insolvent, and its affairs were taken possession of by the said Claude P. Hay, as State Bank Commissioner (whose successor in office is defendant John Duke, Supervisor of Banking), who proceeded to liquidate it, with the assistance of the said Forbes P. Haskell, as Deputy State Bank Comissioner, and, thereafter, and on said 15th day of January, 1921, and because of the insolvency of said Scandinavian American Bank of Tacoma, and said Hay, as such State Bank Commissioner, and said Scandinavian American Building Company; and said Scandinavian American Bank of Tacoma, and said Scandinavian American Building Company failed, neglected and refused to pay to this defendant the sum of $14,288.18, being 75% of the value of the materials and labor of the value of $19,050.90, which had been theretofore certified as delivered and performed, on the 4th day of January, 1921, by the Architect of said building; whereupon and wherefore, this defendant was compelled to cease all work on said building, and said contract was terminated."

Paragraph XXV, (Record p. 304), alleged the filing of appellant's notice of lien on the 14th day of April, 1921, for $41,666.52; copy attached as "Exhibit B", (Record p. 319).

Paragraph XXVI, (Record p. 304), alleged that no other action had been commenced by appellant for the sum due it; and that it had presented to the State Bank Commissioner its claim as a creditor of said Bank, which had been disallowed.

Paragraph XXVII, (Record p. 305), alleged facts in avoidance of Section XIV, of the contract relating to waiver of lien, which were sustained by the decision of the Court. (Record pp. 441-2).

The prayer of appellant was for judgment in the sum of $49,686.10, less such sum as should be awarded to Crane Company, upon its lien claim; and for an attorneys' fee of seven per cent, and costs; that $41,666.32, less any sum awarded to Crane Company, with interest, attorney's fee and costs be adjudged a lien; that $8,029.77 included in such judgment, with the interest thereon, be adjudged and allowed as a claim established against the property and assets of the Bank in liquidation, in the hands of the Supervisor of Banking; that the lien be foreclosed; and the property sold; that any deficiency remaining after the sale and application of the proceeds to appellant's lien be likewise adjudged and allowed as a claim established against the property and assets of the Bank, in liquidation

in the hands of the Supervisor of Banking; and for other proper relief.

The Proof

With confidence it is asserted that all of the allegations of appellant's Cross-Complaint were proven substantially as laid. The exceptions to exact proof were only in some small variations in amounts, and in the correction of slight errors in statement, as, for example:

Paragraph XI, (Record p. 296), alleged that Larson, President of the Bank, subscribed for all the shares of the Building Company, but one for *each* of the other trustees, whereas, he subscribed for 1,996 of the 2,000 shares, leaving only four shares to the other six trustees. (Exhibit 178, p. 17; Record p. 1256.)

Paragraph XII, (Record p. 297), alleged that the Bank purchased Lot 10 from Drury and wife, whereas the purchase was from "Drury, the Tailor" a Drury family corporation; and, although the Bank paid the consideration, $65,000, the conveyance was made directly to the Building Company. (Record p. 1251; Ex. 332; 1064, Larson; 1234-5, Geiger; Am. . . of Duke, Record pp. 89.90).

Paragraph XIV, (Record p. 297), alleged that the $600,000 mortgage to Simpson was assigned by the latter to the Bank January 21st, 1921, where-

as, the assignment was made Oct. 7, 1920, (Record p. 1004), and the recording was in January, 1921, after the failure (Record p. 1005).

Pleadings of the Bank and Commissioner of Banking

The Bank and the Supervisor of Banking, by their Cross-Complaint, (Record pp. 81-85), claimed to own and the right to foreclose a certain $70,000 balance of a mortgage on Lots 11 and 12; and also, the right to foreclose an alleged purchase money lien for $350,000, on Lots 10, 11 and 12, (Record pp. 89-92). The former was disallowed by the Court, (Record pp. 442-4-521) except as an inferior claim, and the latter was abandoned and dismissed, (Record p. 522).

But the same parties also claimed to be entitled to recover $432,822.99, against the Building Company, for advances made for the building construction, and to have the amount established as a lien under the assignment of the $600,000 mortgage made by the Building Company, to Simpson, and by him assigned to the Bank. The Court held the assignment void, but found that the Bank had advanced $232,094.42, to the Building Company and rendered judgment against it, without lien, for that amount and interest. (Record pp. 445-525.)

Appellant's objection to this judgment is, first, that it was error to render any such judgment;

and, secondly, that, as it stands it may be claimed that it takes equal rank with appellant's judgment, unless it be awarded a lien.

However, if appellant's contention that the Bank was at all times the principal and the Building Company only its agent in the building transactions, all question as to the Bank's alleged claims against its own agent (i. e., itself) are obviated.

Facts of Ben Olson Company's Appeal

Ben Olson Company, a corporation, was one of some thirty lien defendants involved in this action, who claimed to have furnished material or labor, or both, in the construction of the bank building; and it is one of the appellants now before the court.

The statute providing for such liens is Sec. 1129 of Remington & Ballinger's Codes & Statutes of Washington, reading as follows:

> "Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any * * * building, * * * or any other structure, * * * has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, sub-contractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter."

The statute in Sections following Sec. 1129, contains provisions usual in such statutes, relating to the land affected, priority over other encumbrances, the form and filing of lien claims, recording right of owners and contractors, foreclosure, rank of liens, etc., etc.

This appellant, was invited by Larson and Drury to bid for the material, labor and construction of the plumbing and heating systems of the proposed building, and on the 25th day of February, 1920, it submitted its bid, as follows: (Exhibit 251, Record p. 868):

Feb. 25, 1920.

Scandinavian American Building Company,
Tacoma, Wash.

Dear Sirs:

We propose to furnish and install the Plumbing and Heating Equipments in the New Building to be erected for the Scandinavian American Bank Building Co., Tacoma, Wash., for the sum of Ninety One Thousand ($91.000.00) Dollars.

This Bid is based on the plans and specifications prepared by Mr. Frederick Webber, Architect and Engineer, modified as follows:

Using enameled iron lavatories Plate B 440 in offices and Plate B 487 in the public toilets as specified.

Also including two house pumps as per specification.

Also including one sump pump.

If Bond is desired cost of same will be added to our bid.

This Bid is based on present freight rates, and in event of a raise in rates same will be

added to cost of all material not in transit.

Soil and Waste pipe to be assembled in pipe space above Bank. Size of waste and vent lines to be according to Tacoma Plumbing Ordinance.

Yours truly,
BEN OLSON CO.
By O. B. Olson, Pres.

It is understood and agreed that this Contractor allows $1,000.00 for the radiation that was in the old building, making our estimated price $90,000.00.

OK, O. B. O.

This bid was orally accepted, but the Building Company proposed a form of contract, which was objectionable because it contained a "waiver clause," Article XIV, as follows:

> "Article XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanics' claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract."

This appellant, (as did several other defendants) by its amended cross-complaint, pleaded facts constituting an avoidance of this provision, by reason of false representations made by the Company's agents to induce the execution of the contract proposed with the waiver clause (Cross-Complaint, Par. XXVII, Record p. 305); and the court below, upon the evidence, sustained the plea. (Decree, Par. XXXIII, Record p. 520).

The contract, dated February 27, 1920, leaving out matter not material here, was as follows, (Exhibit 252, Record p. 869):

> "Whereas, the said Scandinavian American Building Company, Owner, is about to begin the erection of a sixteen story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003) as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T." of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and
>
> "WHEREAS, The said Ben Olson Co., of Tacoma, Washington, is desirous of entering into a contract with the said Scandinavian American Building Company, owner, to furnish all plumbing and heating, as per estimate of February 21, 1920, hereto attached, under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.
>
> "Now this Agreement Witnesseth,
>
> "ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, the sum of Ninety Thousand and no/100 ($90,000.00) Dollars, in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.
>
> "Although it is distinctly understood and

agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

"75% monthly, to be paid in cash, of the estimated value of work delivered and also of work erected in place, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the completion and acceptance of work by the architect.

"ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

"ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of any one, so as to complete the building at the earliest possible moment.

"ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from any one, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

"ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

"Contractor to follow erection of steel work with all main lines for plumbing and heating and to buy, if necessary, piping in the open market in order to keep up with the steel work, so that the whole of said work can be completed within ten (10) months from the date of this contract.

"It is also understood and agreed that the radiators from the old building are to belong to the contractor."

The remainder of the form used was a series of stringent time provisions holding the contractor to strict promptness in the performance of its work, under penalty of $50.00 per day.

Instead of the work being rushed to a completion in ten months, as the contract contemplated, it was so delayed, that appellant was barely able to commence construction at the end of that

time. In preparation, however, to keep up with the demand upon it, appellant procured and assembled certain materials, by July 1, 1920, on the Lots, which with the labor in connection therewith, were of the approved value of $8,541.03. (Exhibit 253, Record p. 875, and Testimony of Olson Record p. 875; and Herber, Record p. 910), and 75% of that sum, with the approval of the Architect's representative, Mr. Wells, was paid, July, 1920.

Likewise, by August 30th, another estimate of material and labor brought on the premises, amounting to $7,972.83, was accepted, and 75% was paid September 25, 1920, (Exhibit 256, Record p. 880).

And a third estimate was presented, January 4, 1921, for $19,050.90, and approved by Mr. Wells, but payment was postponed and not made, because of the failure of the Bank, January 15th. (Exhibit 257, and Olson Record p. 881, and Herber Record p. 257-912).

On the same day that the Bank failed a fourth estimate, amounting to $1,001.43 was presented, but there was no approval, because the entire project was abandoned. (Exhibit 258).

All of the items of materials detailed in the four estimates were deposited on the Lots, excepting certain ones which will be referred to at this point. Some were actually installed in the building.

The materials scheduled were of three classes, viz.:

1. Such as were procured from dealers, and deposited on the premises;

2. Such as were procured from dealers, and, for want of room on the premises, and danger of injury if left on the premises, were stored in appellant's warehouse with approval of Glenn; and

3. Such as were taken out of appellant's stock and placed on the premises, ready for use.

Some of the materials deposited on the premises were procured from Crane Company, and had not been paid for by appellant. Appellant's Cross-Complaint referred to this fact, and disclaimed any recovery for such materials as might be sued for by Crane Company.

Soon after the abandonment of the work, appellant applied to the court for leave to withdraw its unused materials on the premises, in order to reduce the lien as far as possible, and an order was entered allowing the withdrawal of such of those materials as could not be covered by any lien of other parties, amounting to $4,907.52, in value. These were included in Estimates 3 and 4 (Exhibits 257 and 258, Record pp. 881 and 883), and included the following items.

From Estimate 3:

Dec. 3. Galv. Drainage Fittings from B. O.

	Item	Amount
	Stock	$ 540.50
	Malleable Galvanized Fittings	1,864.74
	Galvanized Nipples (only)	557.40
	Cast Iron Steam Fittings	969.26
	1 42x120 Hot Water Generator with steam coil	650.00

From Estimate 4:

	Item	Amount
Jan.	16 ft. 3″ 4 ply Rubber Belting	5.92
	12 3″ Plugs— .50	6.00
	128 4″ Plugs— .82	104.85
	25 1¼″ Plugs— .10	2.50
	4 2″ Plugs— .15	.60
	12 1½″ Plugs— .35	4.20
	12 1½″ Plugs— .10	1.20
	4 1½″ Plugs—2.40	9.60
	65 1″½ Caps	
	25 ¾″ Caps	
	25 1″ Caps	40.75
	1 3″ Expansion Joint	
	1 8″ Expansion Joint	150.00
	Total	$4,907.52

The lien claim filed and asserted by appellant does not include any of the foregoing items reclaimed under the Court's order. The Court refused to allow any of the materials procured from Crane Company and not paid for to be removed.

The items which could not be received or stored on the premises and which are claimed for by this appellant, were such as had been procured for this particular building, and became of little worth when the project was given up. These items were all included in Estimate 3. (Exhibit 257, Record p. 881), and were accepted as delivered by the architect's representative, as appears on the

face of the Exhibit; he agreed that they should be stored in appellant's warehouse, because there was no place for them on the premises. (Herber Record pp. 912-13, and Olson Record pp. 882-3).

These items were as follows:

The following items at Ben Olson Company Shop:

Item	Amount
2 House Pumps	$1,134.00
1 Sump Pump	474.00
17 Sets of Hose Racks	1,542.00
Valves for Branches	265.00
Steam Radiator Valve and Main Steam Trap	2,460.00
Total	$5,875.60

And there were also stored at the same place, under the same circumstances, but not certified on any estimate, though noted on Estimate 6, to be mentioned hereafter: "375 Vacuum Valves for Radiation @ $6.00, $2,250.00", and these, also, are claimed for.

Again, on Estimate 3, there was an item of "86 Hurlbut Fittings, $1,720.00." Crane Company furnished 86 toilet closets and fixtures complete, made to order, and brought from the factory to Tacoma ready for use.

The building contract price of these closets was $7,852.66.

The 86 Hurlbut Fittings were a necessary fixture going with the 86 closets; but the fittings had to be on hand in the building, because they went

into the walls, at the stage of construction called "Roughing In." They were of cast iron; in no danger of damage from exposure, and were included in Estimate 3, at an estimated value of $1720. (Ex. 3, Record p. 881; Olson p. 897).

But the closets themselves, being made of porcelain and polished wood, could not go on to the premises in the condition they were in, because of danger of breakage and weather damage, so they were stored in Crane Company's warehouse, about two city blocks from the building.

These 86 closets were scheduled on Estimate 5 (Ex. 262, Record p. 898), at a value of $6,132.66, and were claimed for.

Lastly, Crane Company, upon the order of Appellant, and to fulfill its contract for plumbing construction, procured to be manufactured specially for this building, the following:

33 Porcelain Urinals, etc. (contract value)....	$2,676.30
24 Enameled Lavatories (contract value)	1,168.80
238 Enameled Lavatories (contract value)	8,275.26
16 Slop Sinks (contract value)	790.40
Total	$12,910.76

These articles are itemized in Estimate 6 (Ex. 263, Record p. 900); they were brought to Tacoma ready for use, were billed to appellant by Crane Company, and because of their fragile character, were stored by Crane Company, neither the building nor appellant having proper storage space.

There was no dispute, or attempted contradiction of appellant's witnesses as to the facts, excepting that appellant's contention that the closets and the lavatories were made specially, and were not adapted to any other building, and hence would be of little value unless used there, was disputed, especially by the Complainant McClintic-Marshall Company, it being contended that they were merely made up from factory stock, as catalogued by Crane Company. This effort of the opposition was not supported by any witnesses of its own, but solely by cross-examination of appellant's and Crane Company's witnesses. We may well submit this point on the testimony of Messrs. Olson, Record pp. 897-907; Herber, Record pp. 920-929; Downie, Record pp. 943, 951.

But the Court did not pass upon this question at all, any reference to it being obviated by its ruling upon the question of delivery.

Therefore appellant presented an account as follows:

Of Materials delivered on premises:	
Estimate 1	$ 8,378.03
Estimate 2	7,764.83
Estimate 3	7,814.40
Estimate 4	675.81
Total	$24,633.07

Of Materials in its own Warehouse:	
Estimate 3	5,875.00
Godfrey Valves	2,250.00
Total	$ 8,125.60

Of Materials in Crane Company's Warehouse:	
Estimate 5. (Remainder)	6,132.66
Estimate 6	12,910.76
Total	$19,043.42
Labor:	
Estimate 1	163.00
Estimate 2	208.00
Estimate 3	779.00
Estimate 4	1,129.80
Total	$ 2,279.80
Grand Total	$54,081.89

The Building Company had paid on account $13,425.56, including $1000 for old radiation and recovery and a lien was asked for the balance of $41,656.33.

It was further alleged and shown that to have completed the work contracted for, appellant would have had to furnish materials of the contract values of $16,691.64, and labor at the expense of $11,-196.70, (Herber Record pp. 915-921). These amounts added to the $54,081.89 furnished would have totalled $81,970.23, leaving the difference between that amount and $91,000.00, the contract price, viz.: $9,029.77, as nominal profit on the job, the contractor bearing all of his overhead expense; and for this sum a judgment was asked, but without a lien.

The lien prayed for was $41,656.33, less whatever sum should be awarded to Crane Company, as a sub-contracting material man, which turned out to be $16,047.03, (Decree Par. 17, Record p. 502.)

The Court below, however, by its rulings:

1. Held that no lien could be had for any materials not actually delivered upon the premises, or used in the structure, rejected as non-lienable.

(a)	The materials stored in appellant's warehouse	$ 8,125.60
(b)	The Closets (Estimate 5)	6,132.66
(c)	The Urinals, etc. (Estimate 6)	12,910.76
	Total	$27,169.02

2. Held that for the materials listed in Estimates 1, 2, 3 and 4, at $24,633.07, appellant was entitled to only the cost of the same, as purchased from Crane Company, viz., $16,047.03, plus 15 per cent or $18,454.08.

3. Entirely omitted to consider the item of $2,279.80 for labor actually performed by appellant. (Herber Record p. 967).

4. Entirely omitted consideration that materials of the value of $1,173.99, which were not procured from Crane Company, were installed in the Building, (Herber Record p. 965, and Ex. 357).

5. Held that by reason of excessive valuation of materials procured from Crane Company, appellant should be allowed no lien for anything and no attorney's fee. (Decree Par. XXVI, Record p. 514.)

6. Awarded appellant a general judgment against Scandinavian American Building Company,

for $13,407.43, but refused to extend the judgment as against the Scandinavian American Bank.

First Error

That a material man or contractor can have a lien for such materials, only, as have been delivered on the premises.

The federal courts very seldom have to pass upon these mechanics' lien cases; and when they do come up, the statute of the particular state, is the measure of authority and the arbiter of decision, the interpretation of the State's appellate Court on a point decided, being of binding force.

Several of the apepllants in this action are interested in this point of "delivery", and doubtless, other and more effective arguments will be made by them in contesting the position of the court below.

The contention of this appellant is, that under the law of Washington, as clearly interpreted by its Supreme Court, Ben Olson Company was entitled to a contractor's lien not only for the materials it brought upon the premises, but also for those which it was compelled, by the sharp terms of its contract as to time of performance, to procure and have on hand ready for installation as soon as the building was ready for them.

When the contractor was bound, by Articles III

and V, (Anti. p.17.), to have its work done within ten months, there was an implied agreement on the other side that it should be given the opportunity to do it within that time. But that agreement was disastrously broken, not of course, entirely by the fault of the owner, but, nevertheless, broken so as to put the contractor in the position of having, on the faith of the owner's promise to have things ready for it, procured some thousands of dollars worth of now practically worthless goods, and of having to place them in warehouse, as near the premises of the owner as practicable, because the premises themselves were unable to receive them; and that too, when the owner's agent, Wells, particularly assented to the storage, and in the case of Estimate 3, noted on its face items to the value of $5,875.60, as at Ben Olson Company Shop, and accepted them as a basis for payment on account.

Why in the name of reason should not a contractor have a right to a lien under such circumstances, as well for such materials, as for those which he was fortunate enough to be able to lay upon the Lots, or in the streets about them?

We take it that a contractor who undertakes to procure, furnish and put materials in place is in no different position from one who agrees to manufacture, furnish and put in place. Each having done his part, becomes entitled to a lien

when the owner abandons the improvement. and violates his contract.

At the hearing of appellant's case, Mr. Olson was asked about materials not taken to the Building (Record p. 896); whereupon counsel for the Bank and Building Company objected on the ground that "he is not entitled to a lien for materials not delivered"; to which the Court replied:

> "Well, if delivery, either actual or constructive, has been waived, another rule might apply, and I cannot tell until I hear the testimony."

We claim that the evidence established waiver as to materials at the shop, and, those covered by Estimate 5, at least, and that the "other rule" should have been applied.

But all question as to "delivery" and "deposit" of materials has been obviated by the Supreme Court of Washington, in *Western Hardware & M. Co. vs. Maryland Casualty Co.*, 105 Wash. 54.

There there was a contractor for a heating and ventilating plant in a schoolhouse, which involved sheet metal work.

The contractor sublet the furnishing and installation of the sheet metal work of the heating plant to one Zimmerer, who had a shop in Seattle.

Zimmerer then bought his sheet metal from the Western Hardware & Metal Company, on the credit

of the building, and the Western Company delivered the metal to Zimmerer's shop.

The entire bill for sheet metal was $766.93, but only $140.00 worth of it actually went into the building; Zimmerer became bankrupt and the remainder of the metal was disposed of elsewhere; or, at any rate it never reached the premises.

A lien claim was sustained for the entire amount.

Too much space would be required to state the argument of the Court, but, beginning with a reference to, and affirmance of the case of *Huttig Bros. Co. vs. Denny Hotel Co.*, 6 Wash. 122, the Court declared in favor of what is known as the Pennsylvania theory which is that the word "*furnish*", as used in the statute, means "provided for in good faith", without consideration of the actual place of temporary deposit of materials; and it then went on to cite numerous and convincing cases from other courts, pausing to eliminate *Liscomb vs. Exchange National Bank*, 80 Wash. 206, and some other Washington cases which were offered as opposing the construction it adopted.

It may be well to refer to some of the cases cited in 105 Wash. 54.

Burger vs. Turnblad, (Minn.) 107 N. W. 543, was based upon facts as follows: The plaintiff was the son of the contractor, and was employed

by his father to work on ornamental plaster casts for the decoration of the plaintiff's house, at 55 cents per hour, the work being done at his father's shop. His entire bill was for $680.05. Of his work only $148.50 worth was put in place in the house. The owner and his father then had a disagreement, and his father, without any justifiable cause, refused to go on with his contract or to allow any of the finished casts to be used in the house, or to deliver them to the owner; and it was held that not only was the plaintiff entitled to his lien, although his work was away from the building, but that his father's arbitrary action did not defeat it.

In *Howes vs. Reliance Wire Works Co.*, (Minn.) 48 N. W. 448, a wire elevator inclosure for a new building was contracted for, and the contractor went on and constructed the inclosure at its shop; but before it could be installed, the owner sold the premises, and the purchaser refused to allow it to be installed, which was the case here.

The opinion, at one place observes:

> "If he (the contractor), *had brought any part of the materials on the premises*, and the sale had taken place while the work was in progress, he could not have been deprived of his right to a lien upon the completion of the job in the building."

And after speaking of the preparation of material at a yard in shop:

"Such work of preparation should be deemed part of the construction or "*furnishing*" under the contract."

And again:

"It is true that the lien law is based on the theory of the increased value of premises, caused by the work or materials furnished, but, where the work is interrupted or materials diverted through the fault or act of the owner, obviously, the rule cannot be applied technically."

Burns vs. Sevelle, (Minn.) 51 N. W. 224, stated a definition, thus:

"In the ordinary understanding of the terms "*furnish for the erection of*", the furnishing the materials is complete when it is sold and delivered for the purpose of the erection."

Another of the cases cited in 105 Wash. is *Trammell vs. Mount*, (Texas), 4 S. W. 377, and the opinion in that case states the rule in cases like this one, namely, when the contractor has been prevented from placing in the building a part of his material prepared at a distance from the premises.

The opinion says:

"If he (the owner), directs, for his own convenience, the material be delivered at some other place, or *after it is prepared, and nothing is left to be done by the material men but to take it to the building spot*, the owner violates his contract and refuses to receive it, it seems that

> justice dictates that through his own conduct the owner should not defeat the lien."

The case was a contest between creditors of the owner, who had levied an execution on the building premises and the contractor, over the question whether the lien of the latter for materials still at his shop was sustainable prior to the execution levy, which the court answered in the affirmative, saying:

> "This ruling leaves the ownership of the stone in Lawson, Smith & Co. the owners, and leaves it subject to their debts."

Appellees will, doubtless, resort to decisions from the Courts of other states which furnish authority *in those states*, for the strict delivery doctrine adopted by the court below; but in the presence of the rule established in Washington, by its Supreme Court, they can have no effect as precedent, in this case. In *Western H. & M. Co. vs. Maryland Casualty Co.*, Supra, at p. 62, the Supreme Court of Washington observed:

> "Of course where a statute, by its terms, gives a lien right only for material actually going into and becoming a part of the structure, as some of them do, such a condition is necessary to support a claim of lien thereunder; but such are not the terms of our lien or bond statute."

But appellees will also cite, with appearance, at least, of confidence the case of *Holly-Mason & Co.*

vs. National Surety Co., 107 Wash. 74, as a later decision of the Washington Supreme Court, which impliedly, was a ruling contrary to *Western* H. & *M. Co. vs. Maryland Casualty Co.*, in 105 Wash.

Now the latter case was decided January 9, 1919, by the unanimous opinion of Main. C. J. and Judges Parker, Mount, Holcomb and Fullerton. The case was reargued before the Court *en banc* (nine judges), and on May 31, 1919, the original opinion was adhered to.

In the meantime, and on May 14, 1919, the Holly-Mason case was decided, by the same five judges, and there was no rehearing.

So far as time goes, therefore, the final decision in the Western Hardware case was the later; and besides it had the approval of the entire bench.

But the two cases did not conflict, either in law or facts. In the Western Hardware case, the materials were delivered to the sub-contractor, Zimmerer, at his shop, there to be fabricated for placement in the building; the sub-contractor is, by the statute, Sec. 1129 (quoted ante. p.13.), made the agent of the owner for lien purposes; and the material man, in that case was held entitled to its lien.

But in the Holly-Mason Case, the difficulty was that the goods, miscellaneous hardware, was not traced either into the hands of the contractor, or

to the premises, and the substance of the decision was that to sustain a lien in such a case of the mere sale of such materials to a contractor, without a showing that the goods were used in, or came to the building, for use therein, would open the way to "the grossest frauds", because the owner might be subjected to liability for many times the materials used or necessary for his building, if the loose method of delivery employed in that case were supported as the basis of declaring a lien.

Here, however, the Court has a case where no such questions arise. Technically a contractor for materials and construction does not "deliver" anything except as he constructs. His materials are always in his possession, and unless they are subject to the lien claim of his vendor, he can remove them and substitute others, if he has them on the ground; even if he violates his contract and refuses to perform it, the owner has no claim upon them unless he has paid, or partly paid for them. This was the very ground upon which the Court below made its order allowing Ben Olson Company to withdraw some of the materials listed in Estimates 3 and 4, from the building.

But such a contractor is not bound to retain materials procured according to the specifications for the building, and accept the great loss which would naturally follow the retention of a lot of specialties, because the owner sees fit to quit the enterprise. And, again, the Court below recognized

this principle, in giving appellant judgment against the Building Company for some thirteen thousand dollars, over and above the award to Crane Company, which included some of the stored materials.

It is therefore submitted that on the question of delivery on the premises, the decision of the Court below as to this appellant was erroneous.

This error corrected would bring in for disposition the machinery and materials at Ben Olson Company's shop or warehouse:

	$ 8,125.60
Items in Estimate 5 (at Crane Co.'s)	6,132.06
Items in Estimate 6 (at Crane Co.'s)	12,910.76
Total	$27,168.42

Second Error

It was error to hold that appellant was limited, in claiming a lien for materials purchased from Crane Company, to the prices charged by the seller, and fifteen per cent.

The proof in this case was (uncontradicted) that when Ben Olson Company made its bid for the plumbing and heating, at $91,000, it was based on careful listing of items required by the specifications. (Olson Record p. 888). Mr. Herber had in Court the book of estimates used and testified from it as to value of items required to complete the contract. Record p. 915).

Olson and Herbert also testified that when each Estimate, 1, 2 and 3, was submitted, Mr. Wells, the Building Company and the architect's representative, checked them over, and, finding them correct, in items and value, approved them, and certified the totals for payment. (Exhibits 253, 255, 257, Record pp. 876- 879-882). In other words, they were found to agree with the contract. This fixed the value as between the owner and the contractor. No one, and especially no other claimant, could dispute them; and still more, especially, no claimant whose rank as a lien holder was superior —laborer, materialman or sub-contractor—could do so. No party of the same rank undertook to do so, unless it be the Scandinavian American Bank which, as we shall hereafter show, was the real owner and liable for the debt.

There was no suggestion of overreaching or unconscionableness in the transaction.

If the job had gone on to completion there can be no question that appellant would have been entitled to judgment for the unpaid part of the full contract price, and its lien therefor. But the work was not completed, solely through the failure of the owner, and the contractor is forced to lose the benefit of his contract, and recover what the law allows him in such cases, and for such recovery he is entitled to his lien.

What does he recover?

To digress a moment.

It will be contended, as it was below, that this is a suit upon the contract; but it is not so. This is an action to enforce a purely statutory lien right, and the remedy is compensation to the innocent contractor for what he has done or finished *at the contract price.* He has three courses open to him: 1. He may rescind the entire contract, and maintain an action at law for the breach; or, 2. He may declare upon a quantum meruit for the value of the labor, and materials furnished; or, 3. He may avail himself of the remedy provided for the enforcement of a mechanic's lien, to recover for the value of the labor and materials furnished.

> *Girouard vs. Jasper*, (Mass.), 318; 106 Northeastern 849.

The first two are actions at law; the third is a proceeding *in rem*, as a suit in equity.

> 27 Cyc. p. 322.

The contract in this proceeding cuts no figure, except that it furnishes evidence of the work to be done and the price of it.

And now returning to the question: What is the measure of the contractor's recovery? We need not go outside the Washington Supreme Court reports. What he recovers is neither damages nor *quantum meruit*, or any other technical thing; but "*such amount as may be due him under the terms*

of his contract". Rem. & Bal. Sec. 1130.

Noyes vs. Pugin, 2 Wash. 653, is the pioneer case in Washington, decided in 1891, but *Chase vs. Smith*, 35 Wash. 631, is oftener referred to, as the authority on the subject of the measure of recovery by a contractor where the owner stops the work.

The contractor undertook to paint a number of houses for $1,210.00, payable as the work progressed. After a few days' work had been done, the owner refused to let him proceed, and let another contract to another painter. The gist of the dicision as affecting the point we are discussing, was that the contractor was entitled to the value of the work done *at the contract* rate. (p. 634).

Chase vs. Smith, after being followed in many cases reported in the Washington decisions, for eighteen years, was brought up again for review in the case of *Davis vs. Thurston County*, decided April 5, 1922, and reported in 19 Washington Decisions (Pamphlet), 265; it will appear in 119 Washington Reports, at the same page. The occasion of the review was that, inadvertently, in *Anderson vs. Hilker*, 38 Wash. 632, a charge to the jury that the contractor was entitled to his *expenditures, in part performance*, was in accord with *Chase vs. Smith.*

The Supreme Court, now, in *Davis vs. Thurston County*, goes over the whole subject elaborately, overrules the Anderson case, and firmly restates the

proper rule, viz., that the value of the work done, *at the contract rate*, is the measure of the contractor's recovery.

And the principle was affirmed, September 8, 1922, in *Bailey vs. Furleigh*, 21 Washington Decisions (Pamphlet), 107, to appear in 121 Wash. 107.

We cite, also, 17 Corpus Juris, p. 858, Note 49, reading:

> "Where performance, under the contract has advanced to a point where it may be determined from the contract what payment plaintiff is entitled to, for the work already done, his measure of recovery is properly the contract price for the part of the contract which has been performed, together with the profits which he has lost from being prevented from performing the remainder of the contract."

6 Ruling Case Law p. 1032, citing, *Gabrielson vs. Hague Box Co.*, 55 Wash. 342-6.

In *Gould vs. McComick*, 75 Wash. 61, where the work was stopped by the owner, and where the contract price was $16,250, $8,000 had been paid, and the evidence was that it would cost $1,500 to finish the job, the Judgment was for $6,500; attorneys fee of $1,500; and foreclosure of a lien for both items.

In *Burroughs vs. Joint School District No. 2*, 155 Wis. 426; 144 Northwestern 977, where a contract provided that 90% of the *value* of construction

should be paid each month, it was held that "value" as there used, meant contract value or the value which a named amount of construction bore to the contract price, and not the *market* value of the construction and materials in question.

The phrase used in the Olson Company contract is "Estimated value", which was the value approved by Mr. Wells in Estimates 1, 2 and 3, and should apply to the others.

See for general discussion, Sutherland on Damages, Sec. 713, (p. 2687 et seq.).

Now, Crane Company presented a claim as a sub-contracting materialman for items furnished to Ben Olson Company ,including those in Estimate 5, amounting to $20,416.80, which included the items contained in Estimate 5. Rejecting the Estimate 5 items, on account of non-delivery, the Court below awarded Crane Company a judgment and lien for $16,047.03, for the delivered items. (Opinion, Record pp. 453-7); and thereupon, finding that Ben Olson Company claimed the contract price for the same articles, (Estimates 1, 2, 3 and 4), $23,459.08, held that in could have no more than the Crane Company's selling price, plus fifteen per cent, which it designated as profit, because the claim represented an "unconscionable" profit, especially as the goods had not been paid for. (Record p. 469.)

It was not the fault of appellant that the Crane

Company goods were not substantially paid for; for had the Building Company made the 75% payment on Estimate 3, which was $19,050.90, the $14,288.17 due January 4th, would have been paid over on the Crane Company account, which was only $15,786.00 (Record p. 956), leaving the balance only $1497.83.

Technically, by the way, it is true that these goods had not been paid for, but in fact all the money Ben Olson Company had received on its contract was paid over to Crane Company, but because Ben Olson Company had not thought to direct its application to the payment of these particular bills, Crane Company applied it on the general account it had with Ben Olson Company. It did, however, charge all of its deliveries on account of this job to Ben Olson Company and held it for full payment, (Record pp. 955-6).

Under the cases of *Chase vs. Smith*, and *Davis vs. Thurston County*, *supra*, the contractor prevented from completing his work is entitled to the contract price for what he has done, including cost of labor and materials, expenses of all kinds attaching to actual operations, his overhead, and his profit. And all those matters went into the $23,459.08, claimed in this case. The overhead, alone, in such work is from 25 to 33 per cent; and in one instance, in this case, that of the claim of the Puget Sound Iron & Steel Works the record of which has been brought here (Record p. 969), the Court allowed a

claim when the excess over cost was 125 per cent, on account of overhead, (Decree, Record Par. X, p. 495). But in that case the claimant had the advantage which came from the cross-examination of its witnesses, whereas, in ours, there was no cross-examination, and no attempt to show excessive charges. The point was made by the Court itself.

The Court's opinion suggested that the overcharge was unconscionable, "at least so far as other claimants are concerned." (Record p. 469).

But no other claimants are interested in the matter, because they are all either laborers or material men, and therefore superior in rank. But if they were not, what difference would it make? Although at the bottom of the list in rank, appellant would not have been heard to question whether the complainant, McClintic-Marshall Company, charged an unconscionable price for its steel, or whether the Far West Clay Company got too much for its tile. Both had contracts, and recovered the contract price, without question; and there was no reason why they should be allowed to interfere with appellant's contract.

It is to be remembered that appellant was the low bidder, and that the Building Company had an architect all the way from Philadelphia to supervise the letting; so there could hardly be any question of overreaching; and there was no evidence of it except the figures, no explanation of which was

called for, either directly, or by the practice in the other cases, all of which were heard before this one.

Appellant contends, therefore, that there should have been allowed to it the difference between the contract price at which it was to furnish the Crane Company materials which were delivered at the building, $23,459.08, and the award to Crane Company, $16,047.03, viz: $7,412.05, and that it should have had a lien therefor. And of course, if either or both of the items contained in Estimates 5 and 6 be allowed, they would be added to the above, viz: $6,132.66, in one case and $12,910.76, in the other.

Third Error

Omitted Materials and Labor

The hearing of this case was drawn out through several months, proceeding intermittently as the Court could get a day or two, now and then, from other pressing business, and it is not surprising that some things were overlooked. After the decision was handed down the court was too weary of the whole matter to attempt corrections.

There were two such omissions in appellant's case.

In the first place, the court assumed that all of the items contained in Estimates 1, 2, 3 and 4, which were not withdrawn under its order, or which were not stored at appellant's shop, had been procured from Crane Company. But it was shown, by permission of the Court after the decision, by Mr. Herber (Record p. 965), that appellant had actually installed in the building materials of its own, not obtained from Crane Company, of the value of $1,173.99. There could be no question of the lienability of these items.

The second omission was the labor which the proof showed was actually performed, and the most of which was certified to by Mr. Wells. No note at all was taken of this item which amounted to $2,279.80, (Record p. 967); and of this amount, also, there could be no question of lienability.

These amounts add $3,453.79 to those heretofore claimed.

Summary of Appellant's Proper Demand Under Errors 1, 2 and 3

Item		Amount
Estimate 1, Materials (delivered)		$ 8,378.03
Estimate 2, Materials (delivered)		7,764.83
Estimate 3, Materials (delivered)		7,814.40
Estimate 4, Materials (delivered)		675.81
		$24,633.07
Estimate 3, Materials (B. O. Co. Warehouse)	$5,875.60	
Godfrey Valves	2,250.00	8,125.60
		32,788.67

Estimate 5, (Remainder) in Crane Co. Warehouse		6,132.66
		38,921.33
Estimate 6, in Crane Co. Warehouse		12,910.76
		$51,832.06
Omitted Installed Material	$1,173.99	
Omitted Labor	2,279.80	3,453.79
		$55,285.85
Less Allowance to Crane Co.	$16,047.03	
Less Paid by Building Co.	12,425.56	28,472.59
Judgment and Lien should be for		$26,813.26

In addition to the above the evidence showed (Record p. 915), that with the expenditure of $16,-691.74 for additional materials and $11,196.70 for labor, viz: $27,898.64, appellant would have completed its work ,at a total cost of $83,184.29, which was $6,815.71 less than the Contract price, for which it was entitled to a judgment without lien.

Appellant's judgment, however, was for only $13,407.43, and interest, with no lien and no attorneys' fee.

Fourth Error

The Court erred in refusing to allow appellant a reasonable attorney's fee.

The statute (Rem. & Bal. Sec. 1141) permits the Court to allow a reasonable attorney's fee to the successful lien claimant; and the Court below, in this case did allow attorney's fees of foreclosure

to each of the other claimants. But having denied appellant any lien at all, though rendering judgment in its favor generally for $13,407.43, it, perhaps consistently refused any attorney's fee, also.

We have previously presented the point that it was error to refuse a lien, for the amount for which appellant was awarded judgment; and we assume that if our contention on that point is sustained, the allowance of an attorney's fee would follow, as matter of course, such fee being based, as were the others, on appellant's entire lien as fixed on this appeal. As may be seen from the decree, the fees allowed the other claimants, for like amount averaged about ten per cent.

Fifth Error

The Court below erred in refusing to hold that the Scandinavian-American Bank and the Scandinavian American Building Company were identical corporations, and that the Bank was liable for the obligations created in the name of the Building Company.

The Bank, a Washington corporation, was controlled by the Act of March 10, 1917 (Session Laws 1917, Chapter 80, p. 271), had its place of business in a six story brick building which it acquired in 19.., located on Lots 11 and 12, Block 1003, in the City of Tacoma. Early in 1919, its officials determined to remove the old building and construct

a new and larger one on the same ground, with Lot 10 added, (Larson Record p. 1040). Lot 10 belonged to one of its Directors, Charles Drury, doing business as "Drury, the Tailor". The Bank procured the enlargement of its capital to $1,000,-000., and then set about the work of financing and constructing its new building. A Philadelphia architect named Webber was retained to prepare the plans, and the President and other managing officers visited New York and other eastern cities seeking opportunity to borrow money. It was assumed by all the persons acting in the matter that when the time came for effective action, there would be no difficulty about procuring the Drury Lot or having the formal action of the Bank's Directors, or any other thing necessary to the project.

It was not the desire of the Bank, however, that it should, itself, execute the instruments required in the financial operations, or that it should appear to the public as so heavily interested in real estate. Therefore, although no such corporation had then been organized, it conducted its negotiations for its building loan, in the name of "The Building Company" or "The Scandinavian American Building Company", and about September, 1919, procured from the Metropolitan Life Insurance Company of New York a tentative commitment to a loan of $600,000 to pay the completion cost of a building to cost $1,080,000, according to the plans prepared by Webber. But before proceeding further, the screen behind which it was intended that

the Bank should stand for purposes of avoiding liability and public criticism, was set up in the form of the "Scandinavian American Building Company", a corporation provided with a paper capital of $200,000.00.

Under the Laws of Washington providing for the incorporation of business corporations (2 Remington & Ballinger's Codes and Statutes, Sec. 3679) the first step is the filing of Articles of Incorporation with the Secretary of State and the County Auditor, which Articles must be executed by two or more persons. In this, the President of the Bank, and one of its Directors officiated. Another requirement of the statute is that the Articles of Incorporation must fix the number and name the trustees who shall "manage the concerns" of the company for not less than two nor more than six month. Articles of Incorporation of the "Scandinavian American Building Company" capital $200,000.00 were executed by J. E. Chilberg, President and Gustav Lindberg, a Director of the Bank on the 18th day of November, 1919, (Ex. 179, Record p. 985) and filed in the office of the Secretary of State on the 21st day of the same month; but they were not filed in the office of the County Auditor until February 26th, 1920. (Ex. 179, Record p. 987).

Section 3683 of the Statute, provided that when the certificate shall have been filed the persons who

signed and acknowledged the same, and their successors shall be a body corporate. The certificate and filing refer to the Articles of Incorporation and the filing in the offices of the Secretary of State and County Auditor. So there was no Scandinavian American Building Company, de facto, until February 26th, 1920.

The Articles of Incorporation provided for a board of seven trustees, viz: J. E. Chilberg, O. S. Larson, Jafet Lindeberg, Gustaf Lindberg, Charles Drury, James R. Thompson and George G. Williamson, (Record p. 987); and these same persons constituted the Bank's directorate. The last statement has been denied by the Bank representatives and perhaps will be denied again; but it is true nevertheless; Bank Minutes of November 25, 1919, (Record pp. 1147 and 933, Ex. 271), and January 17, 1919; (p. 369½, Exhibit 183, Larson, Record p. 1042). Ernest Lister died in 1919 and was replaced by O. S. Larson (Bank Minutes Nov. 18, 1919, p. 401, Ex. 183, Record p. .....) Three new men, Lamborn, Sheldon and Johnson, succeeded Chilberg, Lindeberg and Thompson, at the annual Bank election in January 1920, (Ex. 183, Record p. ....)

The organization of the Scandinavian American Building Company took place November 25, 1919; apparently present, Lindberg, Lindeberg, Drury, Williamson and Larson; absent Chilberg

and Thompson. (Building Co. Minutes, Ex. 178, Record pp.1256-7).

The statute required that the capital stock of the corporation be fully subscribed before it could commence business, and that matter was the first thing attended to by the trustees, Chilberg and Thompson being absent. Both of these at the trial disclaimed having known that they were named trustees. The stock was subscribed as follows:

O. S. Larson, 1996 Shares	$199,600.00
Gustav Lindberg 1 Share	100.00
Jafet Lindeberg 1 Share	100.00
Charles Drury 1 Share	100.00
George G. Williamson 1 Share	100.00
Total 2,000 shares	$200,000.00

(Building Co. Minutes, Ex. 178, p. 17; Record p. 1256.)

This was all the business transacted at the organization meeting, and that was probably the only meeting the Board ever held. There is a sheet of purported Minutes of a meeting held August .., 1920, where four members were represented as present, viz: . . . . ,. . . . ., Williamson and Thompson; but Williamson could not remember any such meeting (Record p. 989), and Thompson entirely repudiated it (Record pp. 1148-1150). Sheldon, who signed the Minutes as Secretary, did not attend and rather thought somebody gave him the form unsigned (Record pp. 1154-5). Neither of the other two trustees was asked

about it. However the substance of the Minutes was that one Simpson, was authorized to borrow $1,350,000, for the corporation, wherever he could. He never did anything in that matter.

Larson testified that his subscription to the Building Company's capital stock, was not for his own account, but on behalf of the Bank, so that it might control the Building Company, and the building after it was constructed (Record pp. 1040-2; 1092-3; 1096-7; 1106-7). He became president of the Bank, in January, 1920, and was always its manager. Drury was made President of the Building Company and was Chairman of the Bank's Board of Directors. These two men, without the specific authority or direction of the Bank or the Building Company carried on all of the subsequent operations which resulted in the partial erection of the proposed building, and the accumulation of the indebtedness which caused its abandonment, January 15, 1921.

In the meantime the following things happened:

1. Nov. 25th, 1919, the Bank's Directors voted a loan to the Building Company of $15,000.00, to be secured by Lot 10, (Record p. 933).

2. February 5, 1920, Drury as President of the Building Company entered into the contract for the building steel, with the McClintic-Marshall Company; and between that time and about March 1, all the other contracts were made by him; but

always under the supervision of Larson, President of the Bank.

3. December 10, 1919, Drury the Tailor, conveyed Lot 10 to the Building Company for $65,000 which was paid by the Bank. (Record p. 1251, Ex. 332.)

4. February 10, 1920, the Bank Directors ordered Lots 11 and 12 conveyed to the Building Company, and this was done February 25th. (Ex. 181, Record pp. 1005 and 1194.)

5. February 29, 1920, the Bank Directors authorized a contract with the New York Safe & Lock Company for the new safe deposit vault, (Ex. 183, p. ...).

6. April 19, 1920. The Bank Directors authorized a loan of $25,000.00 to the Building Company. (Ex. 183.)

7. May 7, 1920, Bank Directors authorized another loan of $25,000.00 to the Building Company. (Ex. 183.)

8. June 25, 1920, the Bank's Ledger credited the Building Company with $200,000.00 paid in full for "Sub. to Capital Stock". (Ex. 190, Record p. 1034; Ex. 250, Record p. 1180; Geiger, Record p. 1243; Ogden, Record p. 1029). The item was entered in the Building Company's Books, (Record p. 1111).

9. On the same day certificates of stock in the

Building Company were executed to the other four subscribers, (Ex. 195, Record p. 1043); in which condition they remained until they were all endorsed by the holders and transferred to the Bank (Ex. 195, Record pp. 1044-5).

Thus, the entire capital stock of the Building Company, covering all the value there was in the three lots theretofore conveyed to it, went back to the Bank, and the Building Company was left without property or resources of any kind wherewith to pay the obligations incurred in its name.

10. Every dollar that was nominally expended by the Building Company, from the preparation of its incorporation papers, to the day all work ceased, on the insolvency of the Bank, January 15, 1921, was furnished by the Bank; of course there was a lot of notes, and memoranda, and Bank bookkeeping over the money it was putting up, because the directors hoped that somehow, from somewhere, somebody would come forward with money to loan sufficient so that the Metropolitan Life $600,000 coming upon completion of the building would serve to return the Bank's advances.

11. The Bank never changed the status of the bank property—Lots 10, 11 and 12 as "Real Estate" on its books, and in its published statements of its resources. (Ex. 226, 227, 349, Record p. 1102-4; 1237).

12. When the State Banking authorities took

over the affairs of the Bank they never ceased to claim the Building Company stock as assets in their hands for liquidation, although at the same time setting up large claims for money advanced by the Bank to itself in the character of sole stockholder of the Building Company.

Therefore, when these matters had somewhat developed after the failure of the Bank, and opportunity for those who had furnished labor and materials for the building had been afforded so that they might know the facts, this appellant and others took the ground that the Building Company was the mere hand of the Bank, in the whole transaction; that the two corporations were identical and that the Bank and its assets were liable for the debts created by the Building Company insofar as the lien laws of the state or the value of the property might not cover them.

And so this appellant in filing its lien claim made both Building Company and Bank, parties thereto, asserting the former to be the agent of the latter, (Ex. 260, Record p. 889), and formally presented to the Bank Commissioner a claim for the amount alleged to be due (which was formally disallowed) (Ex. 261, Record pp. 891-6); and thereafter, when this action was commenced, by its Answer and Counterclaim, and testimony taken on the trial, consistently maintained its contention that the Building Company was merely the dummy agent of the Bank, which, as the principal was

generally liable for any deficiency that might occur upon failure either of appellant's being able to establish a lien for the whole or any part of its claim, or upon its turning out that the property was insufficient, on sale to pay the whole or any part; and the prayer of its Answer and Counterclaim was accordingly, (Record pp. 307-8). And it maintains that position now.

The evidence establishing this identity of the two corporations is all in Volume III, of the Record at the pages mentioned below, and consists of the following, viz:

1. The Minute Records of the Bank, Exhibits, as they appear.

2. The Bank's Book and papers of account as they appear.

3. Articles of Incorporation and Minute Records of the Building Company, Exhibits 178, 179, pp. 985 and 1256.

4. Testimony of Charles Drury, p. 970.

5. Testimony of G. L. Taylor, 971 to 977.

6. Testimony of George G. Williamson, pp. 978 to 1025; and 1168 to 1171.

7. Testimony of M. M. Ogden, pp. 1025 to 1035; and 1118 to 1123.

8. Testimony of O. S. Larson, pp. 1035 to 1110.

9. Testimony of C. C. Sharpe, pp. 1110 to 1115; and 1239 to 1243.

10. Testimony of J. V. Sheldon, pp. 1123-4; 1151 to 1167 and 1229 to 1232.

11. Testimony of Gustav Lindberg, pp. 1124-9.

12. Testimony of J. E. Chilberg ,pp. 1133 to 1142.

13. Testimony of James R. Thompson, pp. 1147 to 1150.

14. Testimony of Frank M. Lamborn, p. 1171-4.

15. Testimony of Claude P. Hay, p. 1182.

16. Testimony of Samuel L. Morse, pp. 1184-7.

17. Testimony of W. E. Morse, pp. 1218-1220.

18. Testimony of A. T. Geiger, pp. 1233-5; 1243-4.

19. Testimony of O. A. Jelleburg, pp. 1235-7.

The Court below, in its opinion deciding the case, because of the great number of matters to be passed upon, was able to give the litigants only the most meager discussion of the testimony, and refused relief, asked. Upon this subject all that was said was (Record p. 447):

> "It has been contended on behalf of the lien claimants that they are entitled to judgment against the Bank, as well as against the Building Company. While in certain particulars the Building Company is to be considered merely as the agent of the Bank, yet the property of the Building Company, which it was represented to have, still remains to be applied in satisfaction of any established claim. It is true that the representations that $600,000 had been secured upon the first mortgage, and that $400,000 additional was available were incorrect, still the representations fall short of such fraud on the part of the Bank and its

agents as would authorize the Court in holding that the debt created was a debt of the Bank, as well as the Building Company. Those were not representations that the Building Company owned property which it did not own, but are rather to be considered as that it had obtained credit, a part of which was secured by such property, which it did not actually have."

In discussing the Bank's contention that it was entitled to a first lien on account of the $70,000.00 paid to satisfy a first mortgage upon the Lots 11 and 12, the Court's opinion remarked. (Record p. 444):

"Were it not for the fact that control of the Building Company was had by the Bank at all times, etc.";

And again, (Record p. 444):

"The Bank was not a stranger, but its control of the Building Company created, rather a trust relation. The Building Company was, for many purposes, virtually the agent of the Bank to accomplish one of its purposes, that is, the improvement of its property, and the providing it with a banking house";

And again, in passing upon the Bank's alleged $600,000.00 mortgage claim, (Record p. 445):

"The Court finds, from the evidence, that for one purpose, at least, the Building Company was, in substance, the agent of the Bank to provide it suitable banking quarters, and that anything intended or done beyond that was incident thereto";

And again, on the subject of the Bank's assertion of a lien for the purchase price of the lots, (Record p. 446):

> "As already pointed out, the Building Company was a Company organized and controlled by the Bank to improve its property and secure for itself a banking house."

Had the decision ran, as we think it should have, to the effect that the Bank was the principal debtor, the result would have greatly simplified the labor of the Court, as it would have eliminated from the case all question of the Bank's claims for advances, which enter largely into the judgment rendered, and which will constitute one of the principal matters to be heard upon this appeal; since if the Bank was the real debtor, it could assert no equity against its creditors, either under the original $70,000.00 mortgage or under any of its other alleged contracts with or advances to its agent.

The two corporations were identical and the obligations created in the name of the Building Company were liabilities of the Bank.

To show the special importance of the foregoing proposition to this appellant, in whose favor the court below allowed no lien, but gave it a general judgment against the Building Company, only, for $13,407.43, at the same time that it allowed

the Bank a like judgment for $232,094.42, we quote here Section 1141 of Remington & Ballingers Code:

> "In every case in which different liens are claimed against the same property, the court, in the judgment must declare the rank of such lien or class of liens, which shall be in the following order:
>
> "1. All persons performing labor;
>
> "2. All persons furnishing material;
>
> "3. The subcontractors;
>
> "4. The original contractor.
>
> "And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor."

As the decree stands, if there is no reversal of any part of it, there must be an excess of proceeds from the sale of the property, over the liens allowed of nearly or quite $300,000.00 to pay the appellant's judgment, since there are appellants, other than the Bank, who also have general judgments.

Points, Authorities and Argument as to the Bank's Liability

Where a corporation procures the creation of another corporation for its own purposes and benefit, of which it retains the whole or substantially the whole capital stock, and the control of its operations, the creator corporation will be held responsible for the new corporation's debts; since the courts will look through the corporate form set up, and any scheme of accounting that may be adopted to present an appearance of separateness, to the actual promoter and beneficiary. This result may be arrived at upon the theory of fraud, or identity of corporations or principal and agent.

Upon this subject the authorities are agreed. Some of them are:

> *Cook on Corporations*, Vol. 3 (6 Ed.) pp. 1983, to 1988 and notes;
>
> *Clark & Marshall on Corporations*, Sec. 7 (c);
>
> *Morawetz on Corporations*, (2 Ed.) Vol. 1, Sec. 227;
>
> *Interstate Telegraph Co .vs. Baltimore & Ohio Tel. Co.*, 51 Federal, 49; affirmed,
>
> *Baltimore & Ohio Tel. Co. vs. Interstate & C. Co.*, 54 Fed. 50;
>
> *Re Muncie Pulp Co.*, 139 Fed., 546;
>
> *Re Rieger, K. & A.*, 157 Fed., 609-13;
>
> *New York Trust Co. vs. Bermuda*, 211 Fed. 989, 998;

J. R. Foard & Co. vs. Maryland, 219 Fed. 827-9;

Grace & Co. vs. Luckenbach S. S. Co., 248 Fed. 953;

United States vs. Lehigh Valley R. Co., 254 U. S. 255;

United States vs. Deleware L. & W. R. Co., 238, U. S. 516;

Chicago E. F. Gas Co. vs. Meyers, (Ill.) 48 N. E. 66;

Chicago G. T. Ry. Co. vs. Miller, (Mich.) 51 N. W. 981;

Danovan vs. Purtell, 210 Ill. 629; 12 L. R. A., N. S. 176;

Potts vs. Schmucker, (Md.) 36 Atl. 592;

State vs. Standard Oil Co., (Ohio), 30 N. E. 279;

Brundred vs. Rice, (Ohio), 32 N. E. 169;

First National Bank vs. Trebein, 59 Ohio St. 316;

Kellogg vs. Douglas Co. Bank, 58 Kansas, 43;

Montgomery Wel. Co. vs. Denielt, 133 Pa. St. 585;

Hibernia Ins. Co. vs. St. Louis etc., Co., 13 Fed. 516;

Swift vs. Smith, Dixon & Co., 65 Md. 428; 433;

Evans vs. Kingston Coal Co., 6 Luzerne Legal Reg. (Kulp.) 351;

Louisville Banking Co. vs. Eisenmann, (Ky.) 21 S. W. 531; 19 L. R. A., 684;

Chicago, M. & St. P. Ry. Co. vs. Minneapolis Civic & Co., Assn., 247 U. S. 490, 500.

In the last cited case the following is said:

> "Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two; (Citing cases).
>
> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to. not for the purpose of participating in the affairs of a corporation in the normal and useful manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or intrumentality of the owning company or companies. *United States vs. Lehigh Valley R. Co.*, 220 U. S. 257, 273; 55 L. Ed. 458, 463; 31 Sup. Ct. Rep. 387 and *United States vs. Delaware, L. & W. R. Co.*, 238 U. S. 516; 59 L. Ed. 1438; 35 Sup. Ct. Rep. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

All of the foregoing are cases clear in their support of the proposition we make. They cover cases of many different circumstances, including contracts and torts, clear cut frauds and perfectly legitimate transactions except as against creditors.

Fraud is not necessary to support identity of corporations.

Of course there are any number of cases in the books where, on the facts, liability was not found to exist, and there has been, in some quarters, a tenacious holding to separate and sole responsibility. But even in New York, where there was some reluctance in recognizing the principle, it was said in, *Anthony vs. American Glucose Co.*, 146 N. Y. 407:

> "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth."

And in *Seymour vs. Spring*, 144 New York, 333-340:

> "The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth."

Private banks in the State of Washington are chartered and governed by the provisions of Chapter 80 of the Laws of 1917, which is a complete bank code. Sections 20 to 55. The general powers are defined in Section 23; and specific authority to hold real estate and borrow money is given by Section 37 and 54 respectively. They are given no power to mortgage real estate.

Provision is made for banking premises, thus:

> "A Bank or trust Company may purchase, hold and convey real estate for the following purposes and no other:
>
> "Such as shall be necessary for the convenient transaction of its business, including with its banking offices other apartments in the same building to rent as a source of income: *Provided*, That as to any corporation hereafter organized not to exceed thirty per cent of its capital and surplus and undivided profits may be so invested: *And provided further*, Any bank or trust company heretofore organized shall not hereafter invest in the aggregate to exceed thirty per cent of its capital, surplus and undivided profits in a bank building without the approval of the State Bank Examiner."

The incorporation of the Building Company was for the purpose of evading the restrictions of the Bank's charter, of not appearing to have much of the Bank's money invested in real property, and of having the reputation of owning a magnificent architectural pile as a place of business. This business building it proposed to acquire, not by the use of the percentage of its capital, surplus and undivided profits, but solely by borrowing upon mortgage of the premises, which was *ultra vires*, and by controlling the Building Company through stock ownership.

In *United States vs. Lehigh Valley Railway Co.*, 254 U. S. 255, the railway company to perpetuate its monopoly of the anthracite coal business in Pennsylvania, and to avoid the Interstate Commerce

and Sherman Anti-Trust Acts, and the constitution of Pennsylvania, which prohibited a common carrier from mining coal, first organized a coal company, the stock of which was owned by the railway company, to take over its coal lands and do the business of mining and marketing. Next it "suggested" the organization of a sales company, 97 per cent of which was to be taken by stockholders of the railway company through the payment of a dividend on railway stock; and the sales company "bought" the coal produced by the Coal Company; the directors of the three companies were pretty much the same.

After stating the facts which justified breaking up the combination, the court remarked:

> "Sufficient has been stated to make it clear beyond controversy that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railway Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands, etc., etc."

And of the Sales Company, it said:

> "It is too plain for discussion that, with a Company thus organized and officered the making of a contract by the Coal Company, for the sale of all of its coal to the Sales Company, was in substance and effect, making a contract with itself, the terms of which it could determine at discretion."

These rulings are pertinent to the situation

here, where the only action of either corporation ever recorded was taken by Bank directors, who were also Building Company directors, in Bank Meeting; and where notes and other pretended evidences of indebtedness, with mortgages to secure them, assignments, etc., were executed by Bank Officers in the name of the Building Company without any vestige of authority, even, from the dummy corporation.

Referring to some cases which hold the principal, whether individual or corporation, liable for the obligations of the dummy agent, *Interstate Telegraph Co. vs. Baltimore & Ohio Telegraph Co.*, 51 Federal, 49, affirmed on appeal in 54 Federal, 50, is in point. The Baltimore & Ohio Telegraph Company, having an extensive telegraph system, procured the organization of the Baltimore & Ohio Telegraph Company of Baltimore County, with a capital stock of $100,000; subscribed for all the stock, and put in some of its employees as directors and officers. The International Telegraph Company entered into a contract with the Baltimore & Ohio Telegraph Company of Baltimore County, which the latter breached; the outcome being a judgment in favor of the former against the latter, which could not be collected, because of "no property": held that the parent company should pay the judgment, because its creature, the Telegraph Company, of Baltimore County was only its agent, and mere name.

W. R. Grace & Co. vs. Luckenbach S. S. Co., 248 Federal, 953, involved damages for the violation of a contract to carry freight by the Luckenbach Steamship Company, which was a dummy corporation promoted by the Luckenbach Company, a large owner of vessels. The suit was against both companies and both were held liable, the opinion saying at the foot of page 955:

> "Moreover, they are liable under the doctrine of principal and agent."

In *Chicago Economic Fuel Gas Co. vs. Meyers*, 48 N. E. 66 (Ill.), the liability of two corporations related in this manner was sustained where the cause of action was damages for personal injuries of a workman.

Louisville vs. Eisenmann, (Ky.) 21 S. W. 531; 19 L. R. A. 684, stated the reasons behind such ruling, thus:

> "It could not have been the legislative intent that any one man could form a corporation of which he is the creator and sole stockholder, so as to limit his liability for debts contracted, and from which he has derived benefit to the extent only of what he might designate his corporate estate. He owns the entire property belonging to the corporation. It is his. He can sell or dispose of it as he pleases; borrow money; acquire property in the name of the corporation for the sole purpose of exempting him from any responsibility other than that belonging to the corporation; and, however reck-

> less or improvident he may be, has all to gain and nothing to lose. He could make a gift of the entire corporate estate, and dispense with all corporate forms; and to say, when exercising such unlimited control, he is not personally responsible, for every debt he contracts would be to pervert the plain purpose of the statute. There is no such being in this state as a sole corporation, and certainly none such allowed to be created by the statute."

Now practically every generic fact in any of the cases cited on this subject, exists in the case at bar; and here we have the added fact that the Building Company was never really organized. Some of its appointed directors did not know of their appointment; only four of them qualified by taking the statutory oath; no meetings were held, even the prescribed annual meeting being entirely omitted; the Articles of Incorporation were not filed with the County Auditor until after the President, who was also Chairman of the Bank's Board of Directors, had been making all the important building contracts for more than a month. Every move was dictated and directed by the Bank's President, Mr. Larson, who, even from New York, tried to stop the building program by a telegram to Drury ordering him not to tear down the old building, because his financial arrangements seemed to have gone wrong.

In the Spring and summer of 1920, there was a vexatious delay in the shipment of steel for construction by the contractor, McClintic-Marshall

Company, and numerous letters of remonstrance were written;—by whom? By Drury? Not at all, excepting one evidently intended to lay the foundation for a claim for damages on account of an expected raise in freight rates. Seven or eight of these letters were written by Larson from the Banks' office, signed by himself as "President", upbraiding the Steel Company for jeopardizing the reputation of the Bank in the eyes of the public by causing delay in the construction of its building . (Record Ex. Taylor 7 to 14, pp. 971-8.)

Why, then, should not the court which found and reiterated that the Building Company was the Bank's agent, as hereinabove quoted, have made its conclusion of law accordingly, and held the Bank, as principal, responsible in that capacity, for any excess over the proceeds of the property?

At the hearing below, counsel for the Bank's representative, cited many cases where identity of corporations had not been found to exist, as might well be done, only one of which we shall refer to, as it will probably be cited here as of importance because it was one from the Supreme Court of Washington. This was *State ex rel Tacoma vs. Tacoma R. & P. Co.*, 61 Wash. 512. But that was not a case of a dummy corporation. To the exact contrary, it is clearly stated in the opinions, both prevailing and dissenting, that the two corporations when organized were competing and hostile; and it was not until after years of operation in that

form, that, by the purchase of a majority of the Traction Company stock, the control of that corporation was obtained by the Tacoma Railway & Power Company. And further, the case was not maintained on any ground of identity of corporations, but because the Tacoma Railway & Power Company had contracted with the City of Tacoma for transfers to and from lines "operated under this franchise."

The basic contention was, that without reference to any stock matter, the Traction line had come to be "operated" by the T. R. & P. Co., under its franchise. Judge Dunbar, dissenting on p. 515 of the report said:

> "There were two lines built and operated as competing lines. The competition was intense to the extent that ordinary courtesies were refused. There was no trackage connection and of course no exchange of cars. The Traction Company managed its affairs in every particular."

Certainly there is no parallel between that case and this; and just as little parallel will be found in any other case where identity was not found as a fact.

It is submitted, therefore, that as provided by the statute, the general judgment should have been entered in favor of this appellant, against the Bank, and established as a claim upon the assets in the Bank Supervisor's hands, as to any deficiency after

exhaustion of the liened property, in accordance with the prayer of Ben Olson Company's Cross-Complaint.

Sixth Error

The Court erred in entering a general judgment in favor of J. P. Duke, as Supervisor of Banks of the State of Washington, against the Scandinavian American Building Company for $232,094.42 and interest, amounting to $19,136.62. (Decree Par. XXXVIII, Record pp. 524-5.)

The Court did not in its opinion, discuss the relations of the Bank and the Building Company, except as it, by the frequent remarks hereinbefore quoted, held that for certain purposes, the Building Company was the agent of the Bank to construct a building for the use of the latter. All there is in the opinion on this subject is to be found on pages 442 to 447, of the Record.

It merely remarked, on p. 446:

> "I find no equity in the Bank or its receiver" (meaning the Supervisor) "arising out of these transactions, and hold the Bank's Receiver a general creditor on account of such advances."

In Paragraph XXXVI, of the Decree, (Record p. 523), in holding the assignment of the $600,000 mortgage to Duke, Supervisor, void, the final reason for such action is given, thus:

"and that Scandinavian American Building Company was the agent of the defendant, Scandinavian American Bank of Tacoma for the purpose of providing the said bank with suitable quarters, and was at all times subject to the control of, and controlled by, said Bank, and that by reason of the trust relation thereby arising, the defendant, etc., etc."

The Supervisor of Banking, taking over a failed bank, stands in the shoes of the bank.

Moore, State Bank Examiner vs. American Savings Bank & Trust Company, 111 Wash. 148-158.

The Supervisor of Banking, in Washington, exercises the same authority as the former Bank Examiner.

We are not interested in Paragraph XXXVII of the Decree (Record p. 524), which, it seems to us, quite inconsistently, gave the Supervisor a judgment against the Building Company for Seventy-odd Thousand Dollars on account of money he had paid to take up the first mortgage for $70,000, because it was made expressly inferior and subordinate to every other judgment therein decreed against the Building Company.

But then comes Paragraph XXXVIII, which reads:

"That from time to time during the year 1920, and prior to January 15, 1921, defendant, Scandinavian American Bank of Tacoma, ad-

> vanced to and for the benefit of defendants Scandinavian American Building Company, various amounts aggregating $232,094.42, no part of which has been repaid, and that on account thereof, J .P. Duke, as Supervisor of Banks for the State of Washington, be and he is hereby decreed to have and recover judgment against said Scandinavian American Building Company in the sum of $232,094.42, and interest amounting to $19,136.62, and for his costs and disbursements to be taxed herein the sum of $.........."

This judgment, it will be noted, is not declared to be "inferior and subordinate" to other judgments, and therein this appellant is interested, especially if in this appeal it should be allowed no lien for the whole or a part of the sum finally awarded it, and the Bank should not be held to be the principal debtor on account of the corporate identity of the two corporations.

We shall not here weary this Court with any argument to sustain Judge Cushman's rulings upon the $70,000.00, the $350,000.00, and the $600,000.00 claims of the Supervisor. These matters are elaborately and exhaustively presented in the Brief of Robert S. Holt, Esq., Counsel for the Far West Clay Company, which Brief we desire to refer to and adopt as our own argument on that subject.

But what Court ever rendered judgment in favor of a principal against his agent employed by him to perform a certain work, as, for example,

to construct a bank building for the use of the principal, for the money advanced by the principal to the agent to pay the cost of the work, and expended exactly in accordance with the principal's instructions, and under his domination and control?

No fraud, no misappropriation, no failure anywhere, except that the principal did not, in one way or another, furnish enough money to finish the project, and the agent held responsible to repay the money it expended as directed!

And not only that, but the principal is placed on an equal footing so far as the only resource which the agent has to pay the people who, through the (let us call them) mistaken representations of the principal, itself, were led to give credit to the agent for thousands of dollars worth of services and property, going into the construction of the bank building for the benefit of the principal.

The Building Company will make no resistance to this absurdity. The Bank and the Building Company were one, from President to pen-wiper; the Supervisor and his deputy, and the Building Company's Receiver, are one, the Receiver fighting all creditors to assist the Supervisor in getting from them the last possible scrap of property standing in the name of the sham corporation. The counsel for the Supervisor and the Building Company are the same—paid out of the Bank's assets. Therefore, there will be no resistance to the judgment complained of, from that quarter. The court

said the Bank was in control of the Building Company, and, by the course of the Supervisor in this case ,he still seeks to control it. At every point but this one, he has met defeat, and he clings to this crumb because, if he can avoid the corporate identity proposition, and sustain this judgment, and if there should be realized from the sale of the lots more than enough to pay off the liens, attorney's fees and costs, he will take practically all the excess, since his judgment by its amount overwhelms the others of equal rank.

The judgment, ought to be reversed, or at least subordinated to every other judgment in the case, as was the $70,000.00 mortgage judgment, as the same "equities" exist in both cases.

The same estoppel should apply that led the Court to sustain the waiver of the lien clause in the contract. The representations as to the financing came from the Bank, which had conducted all the negotiations for a loan before the Building Company was organized, and whose President assured contractors not only that the completion loan was arranged for, but that "if necessary we" (the Bank) "can finance the whole thing ourselves."

But, as we have before remarked, if our contention that the Building Company was only the shadow of the Bank, and that the latter should be held responsible for every obligation undertaken in the Building Company's name, all these discus-

sions will be obviated, and the disposition of all the cases before the Court will be simple and easy.

Respectfully submitted,

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Attorneys for Appellant,
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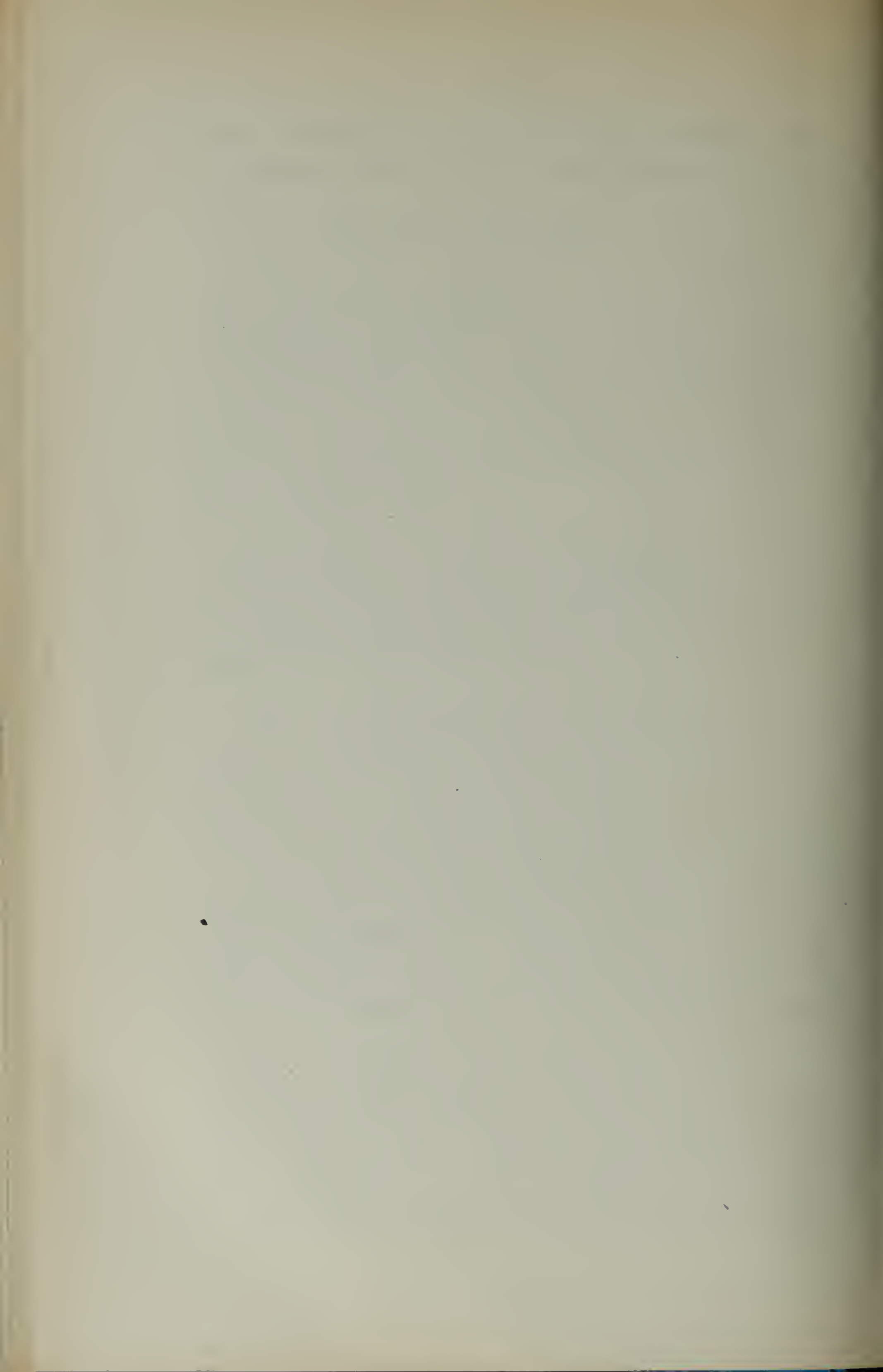
Tacoma, Wash.



No. 3953

In The United States Circuit Court of Appeals
For The Ninth Circuit

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al., *Appellants,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

TACOMA MILLWORK SUPPLY COMPANY, a Partnership consisting of ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A. DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN DAVIS, *Appellants,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS & CO., a Corporation, and FAR WEST CLAY COMPANY, a Corporation, *Appellants,*

vs.

ANN DAVIS and R. T. DAVIS Jr., as Executors of the Estate of R. T. DAVIS, Deceased, et al., *Appellees.*

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

BEN OLSON COMPANY, a Corporation, *Appellant,*

vs.

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J. P. DUKE, as Supervisor of Banks of the State of Washington, and as successor in office of the defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, Jr., as Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation, *Appellants,*

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT TACOMA MILLWORK SUPPLY CO.

EDWIN H. FLICK,
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913-915 Hoge Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT TACOMA MILLWORK SUPPLY CO.

STATEMENT OF FACTS

This action is one begun primarily for the foreclosure of a lien held and claimed by the McClintic-

Marshall Company, plaintiff below, against the Scandinavian American Building Co., which was in process of erecting in the interest of the Scandinavian American Bank a building in Tacoma, Washington, on three lots, two of them for a long time owned by the Scandinavian American Bank, one of them purchased from one Chas. Drury, an officer and director in the bank.

The plaintiff McClintic-Marshall Company was joined in this proceeding by the appellant Tacoma Millwork & Supply Company, a partnership consisting of Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, which sought the foreclosure of its liens, one for material, another for work of erection, a third for bank fixtures and a fourth for door bucks on open account. There were other minor items such as extras and bond which will be explained later.

There are numerous lien claimants who were thereafter either made parties defendant or came in as intervenors.

Resume of Transactions by the Bank and Building Company.

In order to better understand this situation it is well to detail briefly, a history of the transactions between the bank and the building company, which affect the parties to this litigation. The

specific facts on which this recital is based will appear with proper pagings from the Transcript of Record later on in this brief.

Sometime in 1919 the officers of the Scandinavian American Bank formed the Scandinavian American Building Company for the sole purpose of constructing a building upon property it then owned, namely, Lots 11 and 12 Block 1003, Map of New Tacoma, W. T., and upon what is known as the Drury lot, namely, Lot 10 in the same block, then belonging to Mr. Chas. Drury, the Chairman of the Board of Directors of said bank. The trustees of the Scandinavian American Bank and the Scandinavian American Building Company were practically identical. The parties who particularly formulated the policy of the bank and the building company were Ole Larson and Chas. Drury, and, in fact, almost everything seems to have been left to Larson.

The bank purchased the entire capital stock of the building company. Its officers caused the building company to execute a first mortgage of $600,000 on the lots mentioned and the Bank entered into a specific agreement with the building company that the latter execute a second mortgage; issue $750,000 worth of bonds thereon, and grant over to the bank $350,000 worth of the said bonds for the purchase price of said lots 11 and 12. The Bank paid Drury through advances to the building company for lot 10 and the building company was to retain $400,000 of said bonds for building pur-

poses. The $600,000 was also to be devoted entirely to building purposes.

Contracts were thereupon entered into with the various parties to this litigation and others. In obtaining said contracts Larson and others connected with them represented that they had $400,000 cash on hand and that the $600,000 mortgage money had been definitely arranged and was monies with which to complete the building, and that the property was otherwise free and clear, and by such representations among others obtained a waiver of lien from most of the contracting parties.

The building company did not have a cent of money when these representations were made. There had been no definite commitment by the Metropolitan Life Insurance Company, which was to furnish the $600,000. The various parties waiving their liens were wholly misled by these representations. The bank closed its doors January 15th, 1921. The building company had been financed entirely out of bank funds and work immediately ceased and these suits followed.

In substance, so far as this appellant is concerned the real issue on appeal is this—

Appellant's material was all specially designed and specially fabricated, costly mahogany and other high grade mill work. It was 90 per cent completed when the building company failed. It was kept in storage at the request or with the consent of the building company—away from the building under

construction. That this was necessary owing to the fact that rain would mar this work. The trial court held that under our statutes no lien could be given unless delivery was made on the premises.

Owing to the fact that time will not permit of a reply brief we will submit other matters that may affect issues which we believe are of minor importance in our controversy.

Shortly after the commencement of this action one Forbes P. Haskell was made receiver of the Scandinavian American Building Co. He had already been placed in charge of the Scandinavian American Bank as a special deputy supervisor of banks of the State of Washington, J. P. Duke, being the supervisor at this time and successor of Claude P. Hay, during his period designated State Bank Commissioner of the State of Washington.

Mr. Haskell in his official capacity as receiver, of course represented all creditors of the Scandinavian American Building Co., and in his official capacity as Special Deputy Supervisor of Banks in charge of the liquidation of the Scandinavian American Bank at Tacoma, appears in this cause seeking to have placed prior to these lien claimants a mortgage hereafter designated the Penn-Mutual mortgage of $70,000.00, which he voluntarily paid as liquidator of said bank and which, in effect, was owing by the bank. On the other hand he is seeking the foreclosure of a mortgage designated as the Metropolitan-Simpson mortgage so-called hereafter,

of $600,000 which the building company had executed to obtain building funds.

The evidence from the record now follows:

UNITY OF BANK AND BUILDING COMPANY.

The building company was but an entity created by the bank for its own purposes. The following stockholders, trustees and officers of the bank subscribed to one share of stock each: Lindberg, Drury, Lindeberg, and Williamson. (Record p. 1256.) The minute book further recites that on the 25th day of November, 1919, Chilberg, Lindberg, Drury, Larson and Williamson were present as trustees, Chilberg being elected temporary Chairman, and Larson temporary Secretary. The officers elected were: Drury, president; Lindberg, vice-president; Sheldon, secretary, and Ogden, treasurer. The bank's officers at that time were Larson, president; Lindberg and Sheldon, vice-presidents, and Ogden, Cashier. The trustees of the bank were Lindberg, Drury, Williamson, Sheldon, Johnson, Lamborn and Larson (Record pp. 1102-03). Mr. Chilberg was president of the Bank during this year (Record p. 1137).

Larson, the vice-president of the bank, subscribed to all of the remaining stock in the building company, on behalf of the Bank as he says. On June 25th, 1920, the bank purchased all of the stock of the building company, giving it credit on the books of the bank for $200,000. (See exhibit 234, Record p. 1119.) While this account was carried

directly as a stock purchase until December 31st, 1920, O. S. Larson, the president, then attempted to transmute this purchase into a loan of $200,000 to the building company. (Record p. 1119), and under the entries of December 31st, 1920, for the first time, interest is charged upon this account.

Larson and Drury the Active Forces in Both Bank and Building Company.

The matter of building this building and, in fact, the management of the bank was left almost entirely, in the sense of directing all policies involving these two matters, to Mr. Larson, actively assisted by Mr. Drury. (Record p. 1125.)

Gustave Lindberg subscribed to one share of stock and stated he had no time to serve; that during the period the contracts were let by the building company he had nothing to do with them. That Drury was very active; that he, Lindberg, signed the articles but never attended the meetings; that he first found out that the bank had purchased the stock of the building company after the bank was closed; that he left these matters to Mr. Drury and paid no attention to them.

George Williamson, a trustee of the bank and a trustee of the building company, says that Mr. Drury seemed to be the active head; that Mr. Larson had most of the dealings with Mr. Simpson; that he resigned from the bank on finding out, May 7th, that a loan had been made to the building

company. That he knew nothing of the purchase of the stock by the bank until after January 8th, 1921. Says that he continued nominally as a director until after the 8th of January, 1921. (Record p. 978.) That all he knew about the financial arrangement was that it was represented that the building was financed outside of the bank, that statement being made by Mr. Larson and Mr. Drury to the Board of Directors of the bank many times. (Record p. 988.) That he understood that Mr. Larson and Mr. Drury were acting in conjunction with Mr. Simpson and Mr. Webber. He had no knowledge of the assignment by Simpson to the bank of the $600,000 mortgage. (Record p. 1025.)

Chilberg testified (Record p. 1136) that he never knew that the bank had to put up any money to carry the building and did not know of the Simpson mortgage at that time. There was to be an interim loan but he had nothing to do with that and did not take an active interest in the construction or financing of the building. He was not an officer or director of the bank in 1920. He was not present when Mr. Larson subscribed for the bulk of the stock in the building company and does not know whether it was done. He was still president of the bank November 24th, 1919, and does not know that he was ever a director of the building company. He was a director in the bank. (Record p. 1137.) He was apparently one of the incorporators of the building company. He subscribed to only one share of the stock and never qualified. (Record p. 1138.)

He didn't remember hearing about an individual bond from the directors, required by the tentative commitment by the Metropolitan Life Insurance Company (Ex. 1037). He didn't know of any authority by the bank to Mr. Larson to subscribe to the balance of the stock in the building company, namely: $199,600 worth. (Record p. 1141.) Mr. Larson was vice-president and manager of the bank and he and Mr. Drury were active in furthering the building project. Mr. Larson and the other gentlemen at Tacoma were active in handling these things. He was not even in Seattle but very little of the time. (Record p. 1142.)

James R. Thompson says, I was director and stockholder in the bank in the year 1919. I met Mr. Williamson, Mr. Drury and Mr. Larson in the Plaza Hotel (New York) and discussed with them the proposed building. (Record p. 1147.) It was my impression all of the time that I was a director that the financing would be done outside of the bank. I did not qualify or accept a position as trustee of the building company. I was very sick during 1920 and did not know I was a director until after the bank had closed. I had no information that Larson was authorized to sign for the balance of the stock in the building company. I never heard of it. (Record p. 1148). I know nothing about the letting of the building plans or the actual plans. I have only a hazy impression of how the matter was to be financed. I am satisfied that Mr. Larson did run the whole matter and

nobody else had much to do with it while I was connected with the bank. (Record p. 1150).

J. V. Sheldon was a trustee of the bank from January 27th, 1920, on, and was assistant cashier in 1919 and vice-president from January 27th, 1920, on. Larson told him that the building would be financed entirely outside of the bank. (Record p. 1153). That I complained in April, 1920, about the bank advancing any money. That Mr. Drury first mentioned taking an assignment of the $600,000 mortgage and insisted upon it. (Record p. 1154.) That Larson told me that he was going to get an assignment from Simpson to the bank about June, 1920. (Record p. 1157.) I first learned of the stock purchase after June 25th, 1920. I mentioned it to Mr. Larson and I was never consulted as a trustee in reference to the purchase of this stock and had no knowledge of it until I discovered it a few days after June 25th, 1920. (Record p. 1159).

M. M. Ogden says, I was cashier of the bank during this time. With reference to the making of the loans, the loan of November 8th for $100,000 and $50,000 were not put before the board. The one of December 8th, of $50,000 was not put before the board. There was an authorization on April 9th and May 7th for $25,000 each. (Record pp. 1027-28). Mr. Larson did not take up the question of advances to the building company while he was president. The assignment of the mortgage was not taken up at a board meeting. I did not

know until long after June 25th, 1920, that the bank had purchased the stock of the building company. (Record p. 1029). I know nothing about the reason for taking over the assignment from Simpson. (Record p. 1033).

O. S. Larson was vice-president of the bank in the times in issue until January, 1920, when he became president and remained so until its liquidation (Record p. 1035), and was a director of the building company. That he and Mr. Drury made the arrangements for the loan. I subscribed for the balance of the stock on behalf of the bank. (Record p. 1042). The trustees in the building company were all directors of the bank. This was so that the bank could control the building company. Immediately upon receiving my stock certificate I endorsed it to the bank.

I arranged for the assignment from Simpson. (Record p. 1048). I never got any instructions from the trustees to obtain re-assignment of this mortgage to the bank to secure the bank for advances. (Record p. 1051).

Pages 1084-1085, *et sequor* of Record, show that Mr. Larson was the active force in both the building company and the bank. He says he told the bank commissioner that they would have to carry this building to completion before they could get any money from the Metropolitan Life Insurance Company. (Record p. 1085). The other directors never objected to my buying the stock of the building company. (Record p. 1052). I do

not believe it was ever brought up at a meeting of the stockholders, but it was brought up at a meeting of the trustees. (Record p. 1093).

He says that Mr. Simpson had no authority to make any representations, and that neither Mr. Drury nor he, Larson, ever gave him authority. (Record p. 1107). He says he had nothing to do with the building except as a representative of the bank.

Frank M. Lamborn says that he was a director during 1920 and until the closing of the bank. That he first found out that funds of the bank were being used in the building in the late fall of 1920. (Record p. 1172). That Larson several times told him that it had been fully financed. Mr. Drury, late in the fall, mentioned the fact that the advances were secured by mortgages or bonds and were absolutely safe. (Record p. 1172). I am not sure that I ever knew that the bank purchased $200,000 worth of the capital stock of the building company. My consent was never asked. Larson was manager and president of the bank and I had nothing to do with the building company at all. It was left in Mr. Larson's hands to make any advances and he would naturally handle those things. (Record p. 1173). I found out, not in official sense, but while I was director, that the McClintic company had a contract to furnish steel on the building. (Record p. 1174).

Miss Edith Carlson testified that the headquarters of the building company at that time were in

the Tacoma Hotel and I was secretary to Mr. Webber, the architect. Mr. Drury made certain representations to the contractors that $400,000 was on hand. (Record p. 1115).

It will be noted later that the offices of the building company were the personal rooms occupied by Mr. Larson at this hotel. (Record p. 705).

Financing By Bank of Building Company.

C. C. Sharpe says, I was bookkeeper for the Scandinavian American Building Company during the time in issue. The books show a deposit as of date of June 25th by O. S. Larson of $200,000, this entry being made from a deposit book which the bank would have. (Record p. 1111). My offices were down in the same building with the bank and I was part of the time in the bank and part of the time in the offices on the seventh floor where I kept the building company's books. (Record p. 1113). No promissory note covering the $200,000 purchase money was ever given me for entry on my books. The checks were signed by Mr. Sheldon, as secretary and Mr. Ogden, as treasurer, for the building company. (Record p. 114).

Claude P. Hay testified as follows: I am Deputy Supervisor of the Banking Department of the State of Washington. After March 20th, I was bank commissioner and prior to that I had been examiner. I was commissioner from March 1st, 1920, to April 1st, 1921. I had some talk with Mr. Larson with reference to the bank building. Mr. Larson

told me that Mr. Moore, the then commissioner, would not have any occasion to worry since he had financed the building in New York. (Record p. 1175). In the late fall of 1920 Mr. Larson and Mr. Drury came to Olympia to obtain permission to carry the building under certain conditions (Record p. 1177). Mr. Drury, Chairman of the Finance Committee of the Bank, told me that the money advanced was properly secured by a mortgage of $600,000, Mr. Larson joining him in this representation (Record p. 1178, see also p. 1180.) Even after August 23rd, 1920, Mr. Drury assured me that the Bank had not put any money into the building (Record p. 1181).

Samuel L. Morse was a teller in the Scandinavian American Bank. The back of the note card (referring to Exhibit 187) is in my hand-writing and I put that on there under Mr. Larson's instructions. This having reference to a memorandum note against real estate for $200,000 and Mr. Larson instructed us to make a memorandum note of $200,000 against real estate loans (Record p. 1185). The memorandum note was made up by myself and I signed it "Scandinavian American Building Company" and it was never signed by any officer of the building company (Record p. 1187).

C. C. Sharpe testified that the entries relating to the placing of interest charges in the building account with the bank were entered on the books of the Scandinavian American Building Company under Mr. Larson's directions (Record p. 1240).

I was directed to put them in the latter part of September. I took Mr. Larson's instructions because he was actively engaged in the building company's work and I also received instructions from Mr. Drury and other officers of the building company.

Mr. Larson practically, solely, and alone (unless Mr. Drury assisted) arranged for the financing of this building in the following manner:

He reached a tentative agreement with the Metropolitan Life Insurance Company through a broker named G. Wallace Simpson, under which without obligation and under conditions that were never complied with the Metropolitan Life Insurance Company offered to loan $600,000 on the building and site secured by a first mortgage.

The bank then passed certain resolutions to convey title to the building company with the understanding that the building company would execute the $600,000 mortgage which was to be and was recorded as a first mortgage. At this time there was of record the Penn-Mutual mortgage on which there was still due $70,000 and interest. The deed from the bank and from Drury whose lot was free and clear placed the fee simple title in the building company with a warranty on the part of the bank to clear the title so that the $600,000 mortgage would be a first mortgage. This was a direct agreement to pay the Penn-Mutual mortgage. As a counter agreement and as the consideration for the transfer of these lots the building company

agreed to execute a second mortgage securing second mortgage bonds in the amount of $750,000, of which it was to retain $400,000 and grant over to the bank in full payment of said lots as free and unencumbered, $350,000 of said second mortgage bonds.

(The resolutions just mentioned will be found at pages 1042, *et sequor*, Record. See also pages 1005, *et sequor*, Record.)

The tentative agreement referred to which Mr. Larson speaks of as a commitment, but which is wholly conditional, is found at pages 891, *et sequor*, Record. The latter portion of this agreement reads as follows:

> This letter shall be deemed merely a notice, and shall not be construed as an agreement to make said loan, or as imposing any obligation on this company to enter into a building loan agreement in respect thereto.
>
> "It is understood that the money for this loan is not to be advanced until the building is entirely completed and our architect can so certify, and our counsel can certify the property is free from liens which could affect our mortgage."

And another provision that must be noticed is that appearing at the top of page 983, as follows:

> "To guarantee the completion of said building and the removal of any liens which could take priority to our mortgage, as we are to receive the collateral bond of Messrs. Chas. Drury,

J. R. Thompson, George G. Williamson, J. E. Chilberg, Gustav Lindberg and Jafet Lindeberg. It is understood that these gentlemen are to be individually and collectively bound under obligation until the loan has been reduced to $500,000."

The last provision just noted was never complied with. The building itself is even now only partially completed.

Speaking to the resolutions relating to the financing of this building, there were present at the board meeting of the Scandinavian American Bank of February 10, 1920, Messrs. Drury, Lamborn, Johnson, Lindberg, Larson, Williamson and Ogden. At this meeting the transfer of Lots 11 and 12 in Block 1003, Map of New Tacoma, belonging to the bank, was considered (Record p. 1006). The value of the property was fixed at $350,000. The resolutions there duly adopted referred to "a first mortgage for the principal sum of $600,000 to be executed by said Scandinavian American Building Company upon all three lots" (Record p. 1008), and "a series of second mortgage bonds of the total par value of $750,000 to be executed and secured by a second mortgage on said premises," and the affirmative and pertinent part of the resolution now follows:

Now Therefore be It Resolved, that the President and Cashier of Scandinavian American Bank of Tacoma be and they are hereby authorized, directed and empowered to

> execute and deliver to said SCANDINAVIAN AMERICAN BUILDING COMPANY a warranty deed of conveyance to said Lots 11 and 12, in Block 1003, "Map of New Tacoma, W. T." upon receiving from said SCANDINAVIAN AMERICAN BUILDING COMPANY a certificate or agreement agreeing to deliver to said SCANDINAVIAN AMERICAN BANK OF TACOMA, within four (4) months from the date hereof bonds of the par value of $350,000, bearing interest at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as Lots 10, 11 and 12, in Block 1003, "Map of New Tacoma, W. T."

In this resolution (Record p. 1007) is found reference to the $70,000 Penn-Mutual mortgage as a present encumberance upon Lots 11 and 12, the Drury lot being known as Lot 10. The financing that occurred through the bank thereafter appears in Exhibit 185 (page 1026, Record) with this exception: That the credit through the purchase of the stock in the building company in the amount of $200,000 does not appear. Exhibit 190 shows this payment as a debit against stock and security with a contra-credit to the Scandinavian American Building Company of the same amount, namely, $200,000, as of date of June 25th, 1920. The deposit slip shows the credit to the Scandinavian American Building Company as of the same date,

namely, a check of $200,000 (Record pp. 1034-35).

The over-drafts are shown as follows:

May 10, 1920	$ 1,568.62
June 4, 1920	12,156.68
Sept. 22, 1920, about	47,000.00
Sept. 23, 1920, about	72,000.00
Oct. 14, 1920	118,401.78
Nov. 18, 1920	7,429.06
Dec. 15, 1920	6,552.37
Jan. 15, 1921	32,746.42

(Record p. 1111, testimony of C. C. Sharpe.)

Mr. Larson says that the bank was to pay off the $70,000 Penn-Mutual mortgage and then the building company was to pay $350,000 for the property, as already shown in second mortgage bonds, and the mortgage was then to be released (meaning the Penn-Mutual mortgage). The $600,-000 fund was to be used for final completion, and the building company could not get the money until the architects would certify that it was completed or could be completed (Record pp. 1049-50). I figured that the bank would have $350,000 worth of second mortgage bonds for the real estate. $350,000 worth of the second mortgage bonds were to be turned over to the bank for real estate (Record p. 1106). (Lots 11 and 12.)

Exhibit 350, a ledger sheet of the Scandinavian American Building Company, charges to site account $65,000, cost of the Drury lot, and $350,000 covering the double corner, or Lots 11 and 12 (Record p. 1242) and Exhibit 352 is a copy of the

original ledger sheet of the bank in account with the building company. Here again there is charged to the building company the cost of the Drury lot. (See also testimony of Mr. Giger, Record p. 1243.) The bank was still carrying as an asset in its statement of resources at the close of business, February 28th, 1920, the banking house at $280,000, which is the net amount, deducting $70,000, the Penn-Mutual mortgage, from $350,000, the original price for Lots 11 and 12 formerly belonging to the bank.

Mr. Shelton testifies as follows with reference to (Record p. 1160) a note dated October 7th, 1920, in the amount of $363,825, being $350,000 and interest. This was executed by the Scandinavian American Building Company and left with the bank. This was looked upon as a tentative matter to be substituted by the second mortgage bonds in time (Record p. 1162). December 10, 1920, the question of collateralizing the $600,000 mortgage was taken up and passed upon, but there is nothing in the books in reference to that matter and there is no meeting by the building company authorizing this (Record p. 1163). The stock in the building company was, on June 5th, 1920, charged to the stock and bond account (Record p. 1165) of the bank and was done at the direction of Mr. Larson. *I knew we were drawing against the $200,000 which was credited on account of the stock transaction (Record p. 1167). I knew there were overdrafts and Mr. Larson attended to this and when he was not there the overdrafts probably stood*

until he returned. This note of $363,825 was executed to protect the bank as far as we could. It was kept among the papers on my desk. The note was dated October 7th, 1920. The bank deeded the property to the building company under the agreement that the second mortgage bonds would be delivered to the amount of $350,000. To this note was attached a memorandum reading as follows:

> "Amount of bonds to be delivered pursuant to resolution and agreement, February 10th, 1920, $350,000, interest 6% from January 10th, 1920, to October 10th, 1920, $13,825."

Fraud in Obtaining Contracts and Waiver of Lien.

R. T. Davis was manager of the Millwork Company. Attached to the general millwork contract or material contract is the proposal submitted February 17th by our company, both proposal and contract being under Exhibit 151. The proposal was approved or accepted by Mr. Webber, the architect for the building company. Exhibit 151 appears at page 746, Exhibit 152 at page 758, and Exhibit 153 at page 763 of the Record.

Exhibit 152 is the work contract or the contract for the erection of the millwork material and is separate and distinct from the other. The first contract, being the material contract, totalling $65,000, containing separate and distinct terms from Exhibit 152 being for $30,000 and called the

erection contract. Exhibit 153 is a contract for the banking quarters, which is both for material and its erection, amounting to $1,957. (See page 668, Record.)

These contracts can therefore be styled:

The material contract, Exhibit 151, the work contract, Exhibit 152, and the banking quarters contract, Exhibit 153.

Mr. Davis says that the first man he met about February 17th, 1920, in the matter of the proposal was Frederick Webber, who introduced him to G. Wallace Simpson. That same afternoon he met Drury, Bean and Larson at the Tacoma Hotel.

Mr. Davis says, after discovering the waiver of lien clause I instructed my brother after signing the contracts at the factory not to turn the contracts over to the building company unless they accepted the rider reviving the lien in case payments were not made. My brother, George Davis, then 'phoned me from their office and in their presence that all contracts must be exactly alike; that there were no riders in anybody's contracts. That Drury stated that they had $400,000 cash on hand and a mortgage commitment for $600,000 which would be completion money and that there was no need of worry, and that if we were skeptical we could have the money in advance (Record p. 695). That Davis came down the next morning and got $15,000 advance, giving his note, however, the excuse being given by Larson that the contracts had not been entirely signed up and that they

would take the note out of the last estimate due on the building (Record p. 696). Mr. Drury stated that the McClintic people and the terra cotta people had signed identical contracts waiving the liens. I thereupon told my brother that if they had given him these assurances that we would have to submit to like terms. The following day I received similar assurances from Mr. Drury in person.

The McClintic people, however, had distinctly reserved their lien and the Washington Brick, Lime and Sewer Pipe Company had also distinctly reserved it. (See respectively Exhibit F and Exhibit 136.) Mr. Webber had already accepted our proposal and we had waived no lien rights therein. The following day, at his request, I began to perform work on this contract and it was about a week before I saw this formal contract (Record p. 698). I understood that the Metropolitan Life Insurance Company was requiring waiver of lien clause. It is true that I went ahead and did all this work knowing that the riders were not attached (Record p. 699). I relied upon the statement that there was $400,000 cash on hand and that the $600,000 mortgage was definitely financed (Record p. 700). I would not have signed these contracts but for the fact that I had had certain business relations with Mr. Drury for several years and relied on his statement. They said they had a commitment from the Metropolitan Life Insurance Company (Record p. 700). Mr. Drury had told my brother that the steel and terra cotta

people had signed a similar contract waiving their liens. Under agreement that they could advance this money they did give us $15,000 on account (Record p. 701). I found out after the failure of the bank that the building company did not have $400,000 or any appreciable part of it and found out a long time after filing our first lien that it did not have a commitment under the $600,000 mortgage (Record p. 703).

George Davis, assistant manager of the Tacoma Millwork Supply Company, testified as follows: I gave Mr. Webber the figures on the proposal verbally. Mr. Drury introduced him to me as "our architect" and that any arrangement made with the Millwork Company would be satisfactory to himself (Drury). At the mill Mr. Webber gave us the contract and our proposals, now in evidence, were accepted by Mr. Webber and we immediately began work. We prepared detail drawings, bought green lumber and put it in the dry kiln and immediately contracted for mahogany lumber, paying $5,000 the following day to be sure and hold it. This was before we knew there was to be a formal contract. About February 25th we, for the first time, saw such a contract with a waiver of lien clause and then drew a rider to offset it, signed the contract at our office and I took them to Mr. Webber with the rider attached. Mr. Drury objected strenuously and said, "We have $400,000 on hand and $600,000 for completion money," and also said, "This is an eastern form of contract

and it won't hold in this state anyway and if the contract is broken you automatically get your lien." Simpson, Larson and Miss Carlson, Mr. Larson's secretary, and Mr. Webber were present. Mr. Drury said if we were in doubt we could have money in advance, but that the contracts would all have to be alike. That the eastern finance people demanded contracts with a waiver of lien clause. Mr. Drury and Mr. Simpson said the contracts must be uniform, Simpson also saying that his people demanded this. Simpson was introduced as the agent for the Metropolitan Life Insurance Company. Mr. Drury said that the other people were accepting these contracts as made; that the steel and terra cotta people had accepted them.

I then called my brother in their presence stating the substance of this talk and that Mr. Drury had assured me that the other people had all waived a right to a lien. I then repeated my brother's conversation (already given) to these gentlemen in the room. It was then agreed that under the assurances given the riders might be detached (Record pp. 705-707).

The proposals were written February 17th, 1920, and were accepted by Mr. Webber February 18th, 1920, and we commenced work February 19th, 1920 (Record p. 711). The formal contract was submitted to us about February 25th, 1920 (Record p. 714).

Miss Carlson verified the testimony of Mr. George Davis (Record p. 1115). That Mr. Drury repre-

sented that there was $400,000 on hand. That the $600,000 mortgage had been secured or was about to go through (Record p. 1116). That the Life Insurance Company demanded waiver of lien and I got the understanding from conversation between Mr. Drury and contractors that all of the contracts would have to remain alike (Record p. 1116). Miss Carlson, it is true, says at one place that she does not believe that there was any representation that the loan had actually been made. The same representations were made to all the contractors (Record p. 1117).

Elmer E. Davis testified that: Simpson, Drury and Larson stated to me that there was $400,000 cash on hand and $600,000 ready that they had borrowed on a mortgage. This conversation occurred about February 28th, 1920, when I first noticed this lien waiver clause and they then said it was a requirement of the Insurance Company who had loaned them money on the $600,000 mortgage and that all contracts would be signed alike, and that his contract was practically the last one to be signed and that the other contracts had already been signed with this waiver of lien. It was under these assurances that he signed his contract.

George Davis says (Record p. 729), that Mr. Drury, in talking with him, said that the $600,000 represented a first mortgage on the property. That the building company was full owner of the property with nothing against it except this mortgage.

Fulfillment of the Contract by the Millwork Company.

This heading subdivides itself into two divisions —a. *Actual work done upon the various contracts* —b. *Deliveries of such work.*

a. There can be but little question as to the amount of work done upon the contract. There is no countervailing testimony, but some attempt on cross-examination to show that there had not been the amount of work done claimed by the Millwork Company.

R. T. Davis states that the material contract was ninety per cent completed toward the end of December, 1920. Exhibit 154 (found at page 766, Record) shows a computation of various claims, but also shows the state of completion of the material; the legend designating C. W. to mean "complete at warehouse" and C. F. "complete at factory warehouse." Some of the material is marked partially completed, but for this no charge is made (Record p. 670).

About ninety per cent of all the material under these contracts was gotten out, fashioned and tendered to the building company and under the labor contract we performed about twenty per cent of the labor (Record p. 669). The $65,000 contract, or the material contract, covered merely the furnishing of the bare material. We were not to put it in place but were merely to deliver it to the building at the best. The proposal for the material was accepted February 17th and on the

following day Mr. Webber accepted the proposal to do additional labor work, but the proposals for both of said contracts were being considered the same day, one in the forenoon and one in the afternoon (Record p. 689).

George T. Davis says that they had the material contract, or the $65,000 contract, about ninety per cent completed when the company failed and that their charges on Exhibit 154 are only for fabricated material, either completed or in advanced form ready to set up in the building by mere dove-tailing or something of that kind, or in the case of styles that are unusable elsewhere (Record p. 704, see also pp. 712-13).

C. D. Lindstrom, witness for the Millwork Company, said (Record p. 715) that the prices for the materials submitted on the Millwork Company's list are very fair. That they are reasonable prices as of that time and the work is good quality. That it is very near what he would consider a cabinet job of work (Record p. 717). I would say that about one-half of the door stock was finished and veneered and the other one-half was glued up ready for veneering. Fully one-half of it was veneered (Record pp. 718-19). There were 537 door stiles veneered and 356 stiles with cores made up but not veneered and in the pile I found the veneers cut for the bottom and top rails. The panels are all complete and ready for the doors and the material for the doors is all there (Record p. 719). I would say that sixty per cent of the

labor is still to be done on the doors themselves. One could not make these doors under $34 or $36 in quantities and a charge of $20 for the doors in their present state of completion as made by the Millwork Company is very fair. It is practically actual cost. The total cost of such doors with panels would be $33.20 (Record p. 722, see also p. 726).

On the question of fulfillment of contract and its reasonable value there was considered by the court the question of salvage.

R. L. Reedy, called as a witness for the Millwork Company says (Record p. 703), that he was sales manager for the Wheeler Osgood Company. That the prices submitted by the Millwork Company were fair. It is special work and when once cut and manufactured for a particular job it is improbable that it could be used for any other purpose to any profit.

E. C. Cornell, also a witness for the Millwork Company testified as follows: That he has been a general contractor for 32 years. That there might possibly be $1,000 of salvage if this material be sold. The design is a special design and is different from those by western architects. You would have to persuade someone to use this material. Labor is thirty per cent more efficient than two years ago and we are paying $1.00 less.

J. E. Bonnell says in this matter that the panels of the doors are good and the base board could be used. The rest of the material is pretty hard

to put a price on for salvage. I would not give anything for it. If a man had a place to store this material he might roughly estimate three or four thousand dollars for it and then you would have to consider insurance and storage. The job is very peculiar, being an old style and something that has not been done for years.

R. T. Davis states that they have been paying $100 a month for storage of about one-half of this material and, in fact, paid $150 a month for one floor for a short time and that now they are getting it for $75 per month. Insurance runs about $160 a year (Record pp. 728-29).

R. T. Davis testified in similar manner to Mr. Cornell and Mr. Bonnell, in effect, that this is a peculiar style job and the material could not be used on another job because architects usually design their buildings according to their own ideas.

b. *Deliveries*:

The material contract (Record pp. 746-58, inclusive, Exhibit 151) provides in the proposal that the painter for the building company would do the primeing in the factory before deliveries and contains this provision:

> "Owing to the great quantity of this work and our limited storage facilities, it will be necessary that we ask you to provide dry storage space, and accept delivery as fast as manufactured."

The proposal is made part of the contract (Record, see p. 746). The contract was in printed

form and contained provisions applicable to material men and contractors or subcontractors as well. In paragraph V there is a provision to deliver and put in place. This, of course, is negatived by the clause in the proposal to provide dry storage space and by the general tenor of the millwork contract which is merely for material since there is a distinct work or erection contract found on pages 759, *et sequor*, Record.

Exhibit 167 (Record p. 774) is a letter by the Millwork Company to the Scandinavian American Building Company, asking that they be relieved of the storage of these frames; that deliveries of the frames to the building had been greatly delayed through no fault of theirs, to which the building company, through its superintendent, replies that he cannot see "his way clear to receive any frames at the job right away, that he hopes to have room for part of the frames by the 15th of January, and if sooner will advise" (Record p. 175).

Exhibit 168 (Record p. 776) tenders the materials ready to the receiver, Mr. Haskell. Mr. Haskell refused to accept them (also Exhibit 168, Record p. 777) apparently on the grounds—one, that the material had never come under his jurisdiction as receiver of the building company, and—two, that the Millwork Company was to deliver the material to the building site as soon as it was required in the construction of the building.

R. T. Davis, Jr., says in confirmation of these proposals as to storage and deliveries, that Mr.

Webber, the architect, visited the warehouse at Pacific Avenue and also at the factory August 10th, accompanied by Mr. Wells. Later Mr. Drury saw the work and stated that he was well pleased. Mr. Lindberg, one of the directors of the building company, also came out.

Repeatedly prior to the writing of a letter of December 30th we asked them to relieve us of the congestion (Record p. 677) I had a talk with the officers of the building company. We did not deliver on the building for the reason that there was no room for the material there, and they would not permit us to put them on the building because it would slow down the work and there was no roof and the work would be ruined, and it was for their protection and at their suggestion that the work was kept in storage.

We stated to Mr. Haskell that all of the materials were his as receiver, but never received an order from him to place them on the building (Record p. 679). At Mr. Webber's request we rented storage space and paid the rent and had the material covered by fire insurance (Record p. 689). I wrote the letter (Exhibit 175) of August 3rd, 1920, to Mr. Webber, in substance as follows:

> "In reply to your phone conversation in regard to the storage, insurance and delivery of the millwork in storage for the Scandinavian American Bank Building, we wish to state as follows:
>
> "We have and will keep the material in stor-

age fully insured against fire loss, and in the event of fire loss we hereby agree to reimburse you to the full extent of your interest therein.

"Also we agree to deliver all of this material to the building site upon your order.

"We wish to state too, that we will bear the expense of this accommodation ourselves as it is our desire and Mr. Webber's wish that we expedite the manufacture of this material and he acquiesced in this plan of procedure."

About January 6th or 8th I talked again with Mr. Wells to the effect that the material was accumulating and that delivery ought to be made and he again refused to take it on the building, saying that it was impossible owing to the state of the building (Record p. 697). I was after him all the time to take it out of the factory and he replied that he could not take any of it because he had no place to put it.

George Davis testifies that he talked with Mr. Wells several times and begged relief for the overflow of material at the factory. Wells replied that all he could do was keep it. "I cannot put it on the building owing to its condition" (Record p. 707). That the agreement was that they would take it as fast as manufactured. That he, himself, took Webber and Wells through the warehouse down town and the warehouse at the factory and spoke to them about the accumulating charges for rent, etc., and insurance and I was assured that that would be taken care of on final accounting.

The material would have been spoiled if it had been left where water and rain could get to it, which would have resulted had it been delivered on the building and would have resulted in a heavy loss to the building company. It is never customary to deliver this character of material on the premises until there is a roof on the building.

When I handed the key to the warehouse to Mr. Haskell payment had been made on some of the work at the warehouse and some of the work at the factory. We were at all times ready to deliver this material to the receiver and at all times ready to deliver to Mr. Webber and the building company (Record pp. 708-09). When Mr. Webber urged us in the beginning to hurry the material out I said to him, "What are you going to do with it?" *He told us to find some storage space at the factory and to let the overflow go into the warehouse; that they would accept it that way and make payments as manufactured and on notice would have their painters start work on it* and such notice was, from time to time, given (Record p. 710).

Mr. Wells went through the warehouse and the factory and accepted both the material at the factory and the material at the warehouse (Record p. 707). Mr. Drury was there and Mr. Lindberg. We pointed out the congestion at the factory and Drury made the excuse that the building was not far enough along and that he did not see how they could take it (Record p. 711). We had nothing to do with the painting or priming (Record p. 713).

With reference to the open contract on bucks (Exhibit "B" attached to the pleadings) in the sum of $1,266; the bank fixtures contract, Exhibit "C" and the labor contract to the extent of $6,043 certain pieces of wedging, Exhibit "F," in the amount of $8.00 was done. There is no dispute that these items were done. The reasonable value is exhibited.

The following schedule (Record p. 773) gives the method of reaching the totals sued for by the Millwork Company:

Exhibit A, Materials	$58,555.92	
Exhibit B, Door bucks	1,266.00	
Exhibit C, Bank quarters	1,957.00	
Exhibit D, Labor contract	6,043.00	
Exhibit E, Scaffold bucks	200.00	
Exhibit F, Wedges	8.00	
Exhibit G, Bond	718.41	
	$68,748.33	$68,748.33
Credits May 14, 1920, Payments	$ 8.00	
August 16, 1920, Payments	5,100.00	
Sept. 18, 1920, Payments	1,132.50	
Total credits	$ 6,240.50	$ 6,240.50
Balance due		$62,507.83

Profit entitled to on balance of Labor Contract	6,000.00
Profit entitled to on balance of Main Contract	1,000.00
	$69,507.83

A lien was therefore filed for $69,507.83. This compilation is explained by Mr. Davis. (See pages 674, 688, 693 and 701, Record.) In substance this work on the work contract was the fashioning of the material in the factory, mitering it and glueing it, so that this particular part of the work was saved on the erection job and was work that was always left to the independent laborer or contractor who would receive the material from another and erect it.

ASSIGNMENTS OF ERROR.

I.

That the District Court erred in refusing to grant judgment and decree to appellants in the nature of a statutory lien for all materials prepared, as supported by the schedules attached to appellants' complaint, whether stored in warehouse distant from or at the factory, without distinction as to whether it was delivered upon the building, for the reason that under the statutes of the State of Washington, in such cases made and provided, the appellants are entitled to a statutory material lien.

II.

That the District Court erred in refusing to grant a labor lien for work done on material specially designed for this building, for the reason that under the statutes of the State of Washington, in such cases made and provided, appellants are entitled to a labor lien for such work, or are in any event under such statutes entitled to be placed in the position of a subcontractor for the erection of interior finishing upon the building in issue.

III.

That the court erred in not granting to said appellants an attorney's fee commensurate with the work involved and the amount recovered, for the reason that appellants were entitled to a statutory lien for labor and material delivered or furnished for use in construction of said building, and were entitled to have added to their judgment a reasonable attorney's fee under the said statutes.

IV.

That the said District Court erred in giving and granting to certain of the lien claimants a status prior to and superior to that of the appellants herein, in that the lower court granted to those delivering material upon the premises a lien for all of such material, and gave to appellants a lien only for materials delivered upon the premises and refused a lien to appellants for material specially constructed by way of interior finishing for the property in issue but not delivered upon said premises; and particularly erred in refusing to grant such lien since delivery was made at warehouse under special direction of or by consent of defendant Scandinavian American Building Company, hereinafter referred to as the owner.

V.

That said District Court erred in giving to certain labor claimants or subcontractors a status prior and superior to the status of these appellants in the particular of refusing to allow these appellants a lien for labor done upon certain material to make it more ready for erection, being particularly labor on erection, in the amount of $6,043, and in this manner granted a laborers' lien to such laborers or to subcontractors doing laborer's work upon said building who actually performed the labor upon the premises as distinguished from the performance of such labor away from the premises but upon material to be used for the construction of the building in issue, since the statutes of the

State of Washington in such cases made and provided grant a lien for such labor as performed by said appellants and grant no priority in the premises to parties so situated.

VI.

That the said District Court erred in granting to the said appellants a personal judgment for $57,005.67, inclusive of interest as appears in paragraph XXV of said decree, for materials prepared for use in construction of the building in issue, and in not granting a statutory lien for such materials upon said property for the reason that in such cases the statutes of the State of Washington provide a material man's lien; and further erred in granting a personal judgment in the amount of $6,043, plus interest, for certain labor performed away from the premises preparatory to erecting such material under an erection contract, and which labor did or would have facilitated the erection when placed upon the building, instead of granting a lien, for the reasons that the statutes of the State of Washington, in such cases provide a laborer's lien, or in any event a subcontractor's lien, and erred in giving a judgment in damages instead of judgment and lien as prayed for.

VII.

That the said District Court erred in granting to the Scandinavian American Bank rights, by reason of alleged advances under what is known as the $600,000 mortgage, prior and superior to the rights of these appellants, excepting insofar

as liens are granted to these appellants for a minor portion of their material, for the reason that the advances, so-called under the $600,000 mortgage, as claimed by said bank, were made with the full knowledge that these lien claimants were told by the very officers of said bank, who had full control of both said bank and said building company, and were likewise the officers of the building company, that the building company had on hand $400,000 in cash, and that the full amount of the $600,000 mortgage would be used in the final completion of said building, whereas said officers all knew that said building company did not have a dollar on hand; and for the further reason that said building company was merely a creature of the bank or an entity constructed by the bank for its own purposes; and that said band is estopped to claim any preference by reason of the representations made either as to advances under said $600,000 mortgage as claimed, or because of the payment of the $70,000 mortgage; and for the further reason that the said bank warranted said land as free and clear of encumbrances.

VIII.

That the said District Court erred in holding, as more fully appears from the memorandum decision filed in this cause, and dated the —— day of April, 1922, that under the statutes of the State of Washington, relating to material and laborer's liens, the material must be furnished and delivered upon the premises, and the work must be done there,

when in truth and in fact the said statutes do not provide for delivery at all but speak of the furnishing of material for use in the construction of a building.

IX.

That the said District Court erred for the reason that said decision operates to take property without due process of law.

X.

That the said District Court erred for the reasons specifically set forth in the exceptions to the findings in said memorandum decision herein just referred to, and to the further exceptions filed to the judgment and decree against which these assignments of error are laid.

XI.

That said court further erred in said judgment and decree in any and all findings or holdings which grant to any material man, or to any claim other than the preferred class of laborer's rights superior and prior to these appellants as material men, and which grant any rights superior or prior to the rights of these appellants in their labor claim as recited in the schedules attached to said appellants' complaint.

XII.

That said court further erred in not entering an order declaring that all of the material recited in the schedules attached to plaintiff's complaint was and is an integral part of the premises or property herein sought to be liened, for the reason

that said appellant tendered all of said material within the time limited by their contract, that it was specially designed and worthless upon their hands, and that it was stored with the consent of the owner and retained in the storehouse away from the property only because of the owner's convenience, and the safety of the material.

ARGUMENT.

Is Delivery Upon the Ground Itself Under the Statutes of the State of Washington in the Circumstances Detailed in the Evidence Necessary to the Establishment of a Lien?

The principal criticism of the trial court's decree relates itself to a refusal to grant a statutory lien for all materials prepared by this appellant without distinction as to whether they were delivered to the building or stored in the warehouse at the factory or in a warehouse distant from the factory; and its refusal to grant a lien for the labor done on material specially designed for this building which would come properly under the labor contract. This criticism is found in assignments of errors numbers I, II, IV, V, VI, VIII; in the references found in assignment of error number X and in assignment XII.

Under the heading "Fulfillment of Contract by the Millwork Company," found in the statement of facts in this brief, we have detailed, by reference to record pages, the deliveries of the material under the material contract. (See page 29, *et sequor*, of this brief.)

The proposal was attached to and made a part of the contract (Record p. 746). The contract was in printed form and contained many provisions foreign to a material man. The proposal suggested:

> "Owing to the great quantity of this work and our limited storage facilities, it will be

necessary that we ask you to provide dry storage space, and accept deliver as fast as manufactured."

The letter of August 3rd, 1920, Exhibit 175, says: "In reply to your (Webber's) phone conversation in regard to storage, insurance and deliveries of the millwork in storage for the Scandinavian American Building Company * * * we have and will keep the material in storage, fully insured against fire loss * * * agree to deliver all of this material to the building site upon your order." Under Exhibit 167 (Record p. 774), in a letter to the Building Company the Millwork Company again asked that they be relieved of this storage; that deliveries had been greatly delayed through no fault of theirs; the Building Company replying that they could not receive this material then, but hoped to have room for part of it by January 15th. Under Exhibit 168 (Record p. 776) all materials were again therein and verbally tendered to Mr. Haskell the receiver and they were refused on the grounds given at page 33 of this brief.

That R. T. Davis, the manager of the Millwork Company repeatedly prior to December 30th, asked the Building Company to relieve this congestion in storage and the Millwork Company did not deliver at the building because there was no room there and they would not permit it because it would slow down their work; there was no roof and the work would be ruined. It was for the Building

Company's protection and at their suggestion that the materials were kept in storage.

About January 6th, the manager again offered to deliver all materials and the superintendent of the Building Company again refused, owing to the state of the building; that he had no place to put it.

George Davis, assistant manager, testified likewise (page 36 of this brief) that Webber and Wells were taken through both warehouses and they assured George Davis that the accumulating charges for rent and insurance would be taken care of; that rain would have spoiled this work at the biulding and that it is never customary to deliver this kind of material on premises until there is a roof for protection. (See page 36 of this brief.) That they were at all times ready to deliver to the receiver or to Mr. Webber and the Building Company; that they urged hurry on this work and that Mr. Webber told them to find storage space and let the overflow go into the warehouse. *That they would accept it that way.*

That Mr. Wells, as superintendent, went through both warehouses and accepted the material at the factory and at the warehouse. That Mr. Drury made the excuse that the building was not far enough along and they could not take the material on it (pages 35-36 of this brief.)

In the brief submitted to His Honor Judge Cushman, known as the memorandum brief of the Tacoma Millwork Supply Company analyzing a portion of the memorandum decision at page two, we

suggest, before entry of the decree, "That offer was made in open court that Your Honor could clothe the building by a simple equity order granting over this material to the receiver."

Deliveries must be construed to take place in this character of work when once cut to design for it is useless elsewhere, and, impliedly, therefore, the owner accepts it when so specially fashioned regardless of delivery anywhere, unless the fabricator shall have expressly refused delivery.

R. L. Reedy, sales manager of the Wheeler Osgood Company (Record p. 703), a large sash and door factory, says that this is special work and when once cut and manufactured for a particular job it is improbable that it could be used elsewhere at profit.

E. C. Cornell, a contractor for many years, says that the design is a special design and is different from those by western architects.

J. E. Bonnell, another contractor of long standing, says that the job is very peculiar, being an old style and something that has not been done for years. These men all say that the salvage would be practically nothing.

R. T. Davis gives similar evidence as to the peculiarity of style and design and that it would be useless elsewhere.

Mr. Lindstrom (Record p. 715) speaks of this as a cabinet job or work of good quality.

The court in its memorandum decision on the question of this constructive delivery (Record p.

439) in denying a lien right to this appellant, says:

"The court holds that there is no lien right on the part of any claimant here for any material or fixture not delivered on the premises where the building was in course of construction, nor for any labor performed on any such material or fixture.

While it may be true that, in a controversy solely between the material man, or contractor or subcontractor, and the owner, the owner will be estopped to deny the lien because of a failure to deliver the material, where any act of his, or act with which he may be charged, has in any way caused such failure, yet when the substantial controversy is, as it is here, between the lien claimants, no such rule should be applied.

Cases where fixtures or other material not delivered have been specially prepared and their value, apart from the structure for which they have been prepared, is little or nothing, make a strong appeal for consideration in equity, yet to allow the lien on that account would lead to unending uncertainty, doubt and confusion and to prejudice of others contemplating furnishing material or who have furnished labor and material.

Material delivered upon the premises constitutes notice, not only to the owner, but to other material men, laborers and contractors of potential charges against the property, but

materials not delivered, in the absence of actual knowledge, cannot do so.

A particular lien claimant has a right, not only to look to the property improved, but to the value of the improvement as it progresses and to the materials assembled upon, and delivered at the property for its improvement.

Claims of lien for material not actually delivered at the bank building are denied. The following Washington cases—the construction of which court, of the statute involved, this court is bound to follow—require such holding:

Knudson-Jacob Co. v. Brandt, 44 Wash. 68.

Crane Co. v. Fernandis, 46 Wash. 436.

Tsutakawa v. Kumamoto, 53 Wash. 231.

Gate City Lbr. Co. v. Montesano, 60 Wash. 586.

Western Hdwe. & Metal Co. v. Maryland Cas. Co., 105 Wash. 54.

Holly-Mason Hdwe. Co. v. National Surety Co., et al., 107 Wash. 74."

With these authorities before you this court can readily reach a conclusion on this matter. The authorities cited are practically all the authorities in the State of Washington upon this subject.

We will take them in the order of their recital by Judge Cushman.

Knudson-Jacob Co. v. Brandt, 44 Wash. 68:

Here a number of houses were being constructed and it could not be determined what particular part of the material was furnished for any par-

ticular house. The court said of the case of *Western Hdwe. & Metal Co. v. Maryland Cas. Co.*, 105 Wash. 54, at page 67, "This was the real reason that the lien claim could not be sustained."

We suggest that the latter case was decided May 31st, 1919, and is the last expression of the Supreme Court of the State of Washington upon this subject.

The *Holly-Mason* case hereafter referred to appears in 107 Wash. 74, but was decided May 14th, 1919, by the same bench, while the rehearing in the *Western Hdwe.* case was by the full bench under the date given, namely, May 31st, 1919.

Gate City Lbr. Co. v. Montesano, 60 Wash. 586:

Speaking of this case we find that here there was a claim for lumber. The evidence showed the placing of this lumber at a railroad station some distance from the place where the work was carried on. The court said in summarizing this case in the *Western Hdwe.* case, already cited:

> "In that case there was no understanding and no necessity for the lumber being delivered at a shop or place where the contractor or subcontractor was specially preparing his material before being placed in the structure, as in this case."

It also spoke of the case of *Little Bros. Mill Co. v. Baker*, 57 Wash. 311, saying that the lien failed in that case because of inability to trace the material. The Supreme Court then continued:

> "We think none of these cases are control-

ling here."

Crane Co. v. Fernandis, 46 Wash. 436:

The court, in this case, said:

> "We are unable to find competent testimony tending to show that the material was for use in the building, or was so used. The person who it is claimed delivered the material was not in court."

Tsutakawa v. Kumamoto, 53 Wash. 231:

This was a railroad construction lien, and peculiarly was for provisions, groceries and camp equipment supplied to the construction company. The court simply holds that the word "supplies" cannot be construed to fall within material furnished.

Holly-Mason Hdwe. Co. v. National Surety Co., et al., 107 Wash. 74:

In this case hardware was sold by the Holly-Mason Co. to the contractor. Respondent had a place of business in Spokane, some distance from the building being constructed. As orders were received respondent delivered to a common carrier, sometimes to a railroad company and sometimes to an express company, for transportation to a station two and one-half miles from the building. Here the goods were receipted for by the contractor or someone in his behalf. Actually the goods were received by draymen or other employees, and "the respondent was unable to show that more than a small quantity of them actually reached the building." The respondent sued the Surety Company on its bond, executed in behalf of the contractor.

We have left consideration of the *Western Hardware* case to the last and will quote liberally from it, for in this case the question in which we are principally interested is considered.

This is also a bond suit. The court first points out the similarity between these statutes, namely, the lien statute and the bonding statute. The court then sets out the Mechanic's Lien Statute in its essentials:

> "Every person * * * furnishing material to be used in the construction * * * of any * * * building * * * has a lien upon the same for the * * * material furnished by each respectively, * * * and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter." Rem. Code, Sec. 1129.

Now follows the essence of the bonding statute:

> "* * * pay all laborers, mechanics and subcontractors and material men, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, * * *" Rem. Code, Sec. 1159.

The court then says:

> "It would seem, therefore, that, since our lien statute secures by lien payment for 'fur-

nishing material *to be used in the construction,'* etc., and our bonding statute provides for the securing by bond the payment of 'subcontractors and material men and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for *the carrying on of such work,'* there is an analogy between these statutes, insofar as we are here concerned with the question of the necessity of the material furnished by respondent going into the structure of the plant in order to give the respondent the right of recovery upon the bond."

Later the court quotes from *Huttig Bros. Manufacturing Co. v. Denny Hotel Co.,* 6 Wash. 122. Here the material did not actually go into and become a part of the structure.

"It is conceded that said materials were all furnished under a contract between said respondent and said contractor, and that the same were specially designed and made for said building, and are necessary to the completion of the building; that they have been delivered and are now upon the premises of the building. It further appears that the only reason why the same has not been used is in consequence of the contractor having suspended work. Under such circumstances we think the right to a lien for all of said materials exists."

The court continues in the *Western Hdwe.* case:

"The decisions of the courts of other jurisdictions are seemingly out of harmony upon the question of the necessity of material being actually used and becoming a part of the structure in order to sustain a lien for the value thereof in favor of one furnishing such material. This conflict, however, we think, may, in many instances, be regarded as more apparent than real, and as growing out of the language in the different statutes giving the right of lien. Of course, where a statute by its terms gives a lien right only for material actually going into and becoming a part of thestructure, as some of them do, such a condition is necessary to support a claim of lien thereunder; but such are not the terms of our lien or bond statute.

In the early case of *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170, a view of the law was expressed with which our *Denny Hotel* case, above quoted from, is in full harmony. In that case the material seems to have been furnished by a material man to the owner of the building to be used in the construction thereof, such failure not being the fault of the material man. In holding that it was not necessary that the material go into and become a part of the structure as a prerequisite of the material man's rights, Chief Justice Tilghman said:

' * * * The act of assembly makes the

house subject to all debts 'contracted for or by reason of any materials found and provided by any lumber-merchant, etc., *for* or *in the erecting and constructing of such house;*' that is to say, furnished *for* the erection of the house or used *in* the erection of the house. The expression seems intended to meet the very case which has occurred. The merchant having sold and delivered the materials for the purpose of being used in the building, could do no more; it would be unjust, therefore, to throw upon him the risk of their future application. But it is said that there is a distinction between materials delivered *at or near* the building or at a *distance* from it; but I cannot see it, provided that the delivery *at a distance* was in the *usual course of business*, as it was in this case. It is customary to prepare part of the carpenter's work at the shop; why then should the boards be thrown down first at the building, in order to be taken up again and carried to the shop? The delivery at one place or another, is no further important, than that it furnishes evidence of the purpose for which the materials were sold. The act of assembly makes no mention of the place of delivery * * * I am of the opinion, that the account of C. J. Remington should be allowed as a lien,

> although the lumber was not delivered *at or near* the house, or *used in the building of the house.*'

In this case is also cited *Beckel v. Petticrew*, 6 Ohio State 247, and in this latter case is cited *Foster v. Doble*, (Nebraska) 24 N. W. 208, referred to in the *Holly-Mason* case, 107 Wash. 78.

We think, and express it with certainty, that the use of the foregoing cases by the Supreme Court of the State of Washington in the *Western Hardware* case fixes the law of this State—That deliveries of specially designed material is not required to give rise to a lien so long as there is willingness to deliver and good faith on the part of the contractor.

The court continues in the *Western Hardware* case:

> "In *Berger v. Turnblad*, 98 Minn. 163, 107 N. W. 543, 116 Am. St. 353, there was involved a claim of lien for work upon material furnished for the building, done at the instance of the contractor at a shop away from the building, which material, and hence, such work did not go into the structure. In holding that the claimant had a right of lien under such circumstances, Chief Justice Start, speaking for the court, said:
>
> > 'It is true as a general rule that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work

must be done, or the material delivered on the premises upon which the building is being erected. The case of *Howes v. Reliance Wire Works Co., supra* (46 Minn. 44, 48 N. W. 448), however, establishes an exception to this rule which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises.'

The findings of the trial court in this case brings it clearly within the exception, for the work of the plaintiff was by the consent of the defendant, performed at the shop and it was there passed upon by the defendant and by his architect as the work progressed. The defendant and the contractor adopted the shop as the place for doing the work which was necessary to be done in the erection of his house. The plaintiff's right to a lien then is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises on which it was being built and the contractor had refused to permit the product of his work to be placed in the house.' "

The court cites the following additional cases: *Trammell v. Mount*, 68 Tex. 210, 4 S. W.

377, 2 Am. St. 479;

Watts v. Whittington, 48 Md. 353;

Nelson, Benton & O'Donnell v. Iowa East R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124;

Burns v. Sewell, 48 Minn. 425, 51 N. W. 224;

Crane & Co. v. United States Fidelity & Guaranty Co., 74 Wash. 91, 132 Pac. 872;

Phillip's Mechanic's Liens (3d Ed.), p. 260;

2 Jones Liens (3d Ed.), Sec. 1329.

The Supreme Court of the State of Washington then definitely and distinctly establishes the law of this case now before this court in the following language:

"It is further contended in appellant's behalf that respondent's claim against appellant, as surety on the bond, must fail because the material so furnished by it was not delivered at or near the school building in which the plant was being installed. The decision of the Pennsylvania court in *Hinchman v. Graham*, above quoted from, is authority against this contention, as is also the decision of the Minnesota court in *Berger v. Turnblad*, above quoted from This view of the law also finds support in *Trammell v. Mount, supra*, and *Evans Mable Co. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667, 109 Am. St. 568.

The following of our decisions, it is insisted, hold to the contrary, but we think they do

not do so when critically read: (The court then cites:)

Knudson-Jacob Co. v. Brandt (*Supra*);
Little Bros. Mill v. Baker (*Supra*);
Gate City Lumber Co. v. Montesano (*Supra*).

The right of lien is not defeated where delivery is prevented by the act or direction of the owner as to delivery at another place, or when the material is ready for delivery the owner violates his contract and refuses to receive it. This is true of work necessarily done in a mechanics shop, 18 R. C. L. Mechanics Liens, Sec. 51, citing many of the cases presented in the Western Hardware case.

The earlier Minnesota cases are approved in doctrine in the case of *Thompson-McDonald Lumber Co. v. Morowitz*, 149 N. W. 300, and *Minneapolis Sash & Door Co. v. Hedden*, 154 N. W. 511.

Judge Cushman's decision leads to the idea that no large office building can be undertaken in its specially constructed work with safety because the great cost of that character of work is the specialized labor, and at any moment this entire work, on failure of the owner, may fall to the ground. The statute never contemplated such a risk. It invites the material man to proceed in fashioning his material and when it is necessary to fashion it away from the plant, and it is common usage to do so, we can conceive no logic in the idea that the other lien claimants might omit something or might be prejudiced in something on the theory that they

did not know of potential delivery of this character of material. One might as well speak of orders given for specially constructed vaults, costing thousands of dollars, absolutely necessary for a bank as is known under modern condition, and which could not in the character of the work have begun constructing until after the contract was let for the building. Suppose that the vaults were on their way, the owner to take delivery at Tacoma, and the owner goes bankrupt. What right has the receiver to refuse these vaults which necessarily belong to the building? The statute is designed to protect. It has been repeatedly held that it demands liberal construction by our own Supreme Court.

His Honor Judge Cushman feared that because actual deliveries had not been made that some of the other lien claimants might be affected, but we sincerely submit that His Honor did not give full effect to the repeated tenders of delivery to the receiver nor to the offer in open court that the court might, by an equity order, grant over to the receiver and thus by construction deliver all of this material at the building.

Had Judge Cushman exercised this equitable right we submit that even he would have left the material in storage rather than submit it to the Puget Sound weather in the winter months of the year.

This special material is at hand. It is an eight month job to repeat it or replace it. In order to

finish the building it must be obtained somewhere. With it at hand it not only enhances the building in the sense of present value, but in the sense that it would speed up completion of the building some eight months. It is, therefore, distinctly important to the remaining lien claimants that this material, as well as the terra cotta, which another lien claimant manufactured, be obtained for this building now so that a sale of the building will be the sale of a building with practically all of the gross and specially designed materials ready for placement.

We cite a few authorities that are well considered we believe on the question relating to the necessity of placing the material directly into the building. See *Evans Marble Co. v. Trust Co.*, 101 Md. 210, 60 Atlantic 667. Here the work of carving and cutting marble was done away from the premises and the plaintiff was not only to cut and furnish the marble but to completely put it in place and finish in place.

See *Emery v. Hertig*, 61 N. W. 830, a similar case under the statute giving a lien for performing labor or furnishing skill for the erection of the building.

See *Pittsburg Plate Glass Co. v. Leary*, 31 L. R. A. N. S. 746, in which the weight of authority is held to be that the actual use of articles furnished is not necessary where the lien is given for materials furnished for the construction of an improvement.

See also annotation to 1918 L. R. A. N. S. 1043, holding to the general rule we contend for.

See also 18 R. C. L. Subject Mechanic's Liens, Secs. 50 and 53, holding to the general rule that if the materials were not incorporated in the building by reason of the default of the contractor, a lien would still lie. (See particularly *note 3* at the bottom of page 921.) This being particularly true if the failure to use is due to the fault of the owner and the right to lien is not defeated when delivery is prevented by the act or direction of the owner. See Sec. 51, same citation.

We sincerely believe that this case turns upon a simple proposition of whether an owner can say to the fabricator of specially designed material "You place it in storage for me," and then, on his failure or arbitrary refusal to take it, the suggestion will be accepted that because it had not been delivered at the building site no lien attaches.

Our statute is peculiar in this regard. It does not require deliveries upon the building site. Its provision is one of "furnishing material to be used in the construction of any building." In California a somewhat similar statute was construed.

Tibbets v. Moore, 23 Cal. 208;

In this case it was held that the lien accrues when the fabricator has the material ready for delivery to the place where he has agreed to make delivery. The court said:

> "The question is whether or not the word 'furnish' as used in the statute means de-

livered to the building in the construction of which the materials are furnished. We think such is not its reasonable construction."

If a certain place is designated and where the materialman parts with control thereof the furnishing is complete and a lien must be allowed. See:

Western Coal Mining Co. v. James, 33 N. W. 22 (Iowa);

Congdon v. Kindell, 73 N. W. 659 (Neb.)

A similar holding is found in:

Great Western Mfg. Co. v. Hunter, 16 N. W. 759 (Neb.);

King v. Cleveland Shipbuilding Co., 34 N. E. 436, (Ohio);

See also:

Clark v. Lindsey & Co., 47 Pac. 102; tl A. S. R. P. 479 (Mont.);

and as containing a summary of the above cases see:

McEwan v. Montana Pulp & Paper Co., 90 Pac. P. 359.

The City of Tacoma is a city of approximately 100,000 people. The corner on which this building is being erected is prabably the busiest corner in the city. Car lines parallel it on both sides and it is a transfer point. The city could not have permitted storage of this material around this building and certainly not of the quantity referred to in this lien. In modern cities of fair size it is wholly inconceivable that the material going into the construction of a sixteen story building could be de-

livered on the premises or at the premises, so that there must always be constructive deliveries in such cases.

If for the convenience of the owner it is stored across the street or in the alleyways what difference can this make over storage in a convenient warehouse for his protection and accommodation?

Foster Lbr. Co. v. Sigma Chi Chapter House, 97 N. E. 801;

Atlantic Terra Cotta Co. v. Moore Constr. Co., 80 S. E. 924.

In this latter case the court clearly sets out the right to lien without incorporation or delivery to the building itself, as follows:

1. Where materials have been prepared or furnished as ordered and the owner refuses to accept or use them.

2. Where work has been actually performed in accordance with the contract there should be no loss of lien after the work has been stopped or abandoned in consequence of the default of the owner.

3. Where the work has been done by the contractor, under a contract with the owner, on material at the yard or shop of the contractor, with the express or implied consent of the owner, in which event it is said that the work of preparation and manufacture should be designated a part of the construction or furnishing, and in which case it is immaterial as between the parties to the contract with respect to a contractor's right

to a lien, subject to the final completion of the contract, that the work was not done on the premises.

In support of these propositions the following cases are cited:

Howes v. Reliance Wire Wks. Co., 48 N. W. 448, Minn.);
Burns v. Sewell, 51 N. W. 224, (Minn.);
Huttig Brs. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122.

The above case goes off on another point but the statement of the exceptions is fairly presented.

A case in which this character of the work is done is *Chicago Bond & Surety Co. et al.*, 181 N. W. 282 (Iowa), a case decided February 28, 1921, where the lien was for mill work especially constructed for the building in question. This case it seems to us is absolute authority for the point that mill work especially constructed in the shop of the contractor is furnished, within the meaning of the statute, even though there is no delivery, and at the time of the filing of the lien the material has not been incorporated in the building. It might be claimed that this case does not go as far as above stated because after bankruptcy the balance of the mill work undelivered at the time of the filing of the lien was put into the building, but the decision of the court does not turn on this point because this subsequent delivery and incorporation was under a special contract which was without prejudice to the lien right, this contract being made subsequent to

the filing of the lien, and the court flat-footedly holds that it is not necessary in all cases that the material would be actually used in the structure. It says:

> "We think it was furnished even when not actually delivered before the filing of the lien."

The Howes case and the case of *Lee v. Hoyt* are cited as bearing upon this matter as is the case of *Dickson v. Gray*, 8 S. W. 88, and from the citation of these cases, and others mentioned in the opinion, it is apparent the court goes the full length of holding that the stuff is furnished though undelivered where it is especially made for the building, and the fact that it has not been delivered is not in any wise due to the fault of the material man.

Upon the point that the lien is not defeated because the owner stops the work, see case of *Neilson v. Iowa Eastern R. R. Co.*, 1 N. W. 434, 33 Am. Rep. 124, cited in the Sheldon case supra, where the court says:

> "All the material man has to do under the statute is to 'furnish' the material for the designated use, this gives him a lien to the extent of the value of the materials furnished after the building or any part of it is constructed, it is immaterial whether the materials are used or not. If this be not so the owner might sell the material furnished and with the money obtained therefrom purchase other materials and erect the building therewith, and thus defeat the lien. Such a prop-

osition cannot we think be maintained and it was so held in *Esslinger v. Huebuer*, 22 Wis. 602."

To this same point is the case of *Straus v. Steckbauer*, 161 N. W. 259 (Minn.), where the court says:

> "The material having been furnished and used in the construction of the foundation in good faith by the material man, the lien attached when the material was delivered upon the premises * * * nor will such lien be defeated by an abandonment of the improvement."

The case of *Neilson v. Eastern R. R. Co.* (*Supra*) interprets some of the most important cases on this subject, the Howes case supra, and the case of *Berger v. Turnbald*, 107 N. W. 543, 116 A. S. R. 353 (Minn.), quoted in the Western Hdw. & Matal case, and also the case of *John Paul Lbr. Co. v. Hormel*, 63 N. W. 718 (Minn.), and the case of *Burns v. Sewell*, 51 N. W. 224, as well as the Thompson-McDonald case, hereinafter referred to. And the decision is strong in its holding that a lien for architects' plans will be given against the land, even though the construction is abandoned, where it is done by the owner of his own volition without fault of the architect.

One of the clearest cases and probably the best discussion on the question of delivery is the case of *Thompson-McDonald Lbr. Co. v. Morowitz*, 149 N. W. 300. This case should be read in extenso, as we think it is the best presentation of the ques-

tion of delivery to be found in any of the cases we have read. The general holding of the case is that all that is necessary to comply with the statute in the matter of delivery, is not actual delivery, but merely a delivery in good faith to the contractor whether that delivery takes place on the premises or not. It was said in that case:

> "The Minnesota court has held: 'We have also held that a delivery of material upon the premises is not necessary to give life to the lien in those cases where a delivery is deterred by the owner, this includes instances where the material is especially prepared in conformity with special orders." *John Paul Lbr. Co. v. Hormel*, 63 N. W. 718; *Berger v. Turnbald*, 98 Minn., 163, 107 N. W. 543, 116 Am. St. Rep. 353, and nothwithstanding expressions found in the opinions that delivery upon the premises is usually necessary, the logical result of our decisions leads to the conclusion that as against the owner, that material sold and in good faith delivered to the contractor and not used in the building entitles the material man to a lien whether the material be in fact delivered upon the premises or not. If it be delivered to the contractor for use in the construction it would seem a strain to hold, and clearly a departure from the logic of prior decisions, that the ma-materialman is bound to follow the contractor to the premises and see to it that the material is taken to and deposited thereon. Our de-

cisions are to the effect that if the material be in fact delivered upon the premises, the subsequent act of the contractor, even tho fraudulent, in removing the same and converting it to his own personal use does not defeat the lien. If such removal does not defeat the lien it is rather difficult to understand why the failure of the contractor, to whom possession has been given, to take the material to the premises at all should defeat the lien * * * If the material in a given case be delivered in the possession of the owner it seems clear that no court would hold that his failure to deliver the same upon the premises would affect the rights of the material man. We can conceive of no valid reason for applying a different rule where the delivery is to the contractor, the agent and representative of the owner, and for whose acts the owner is responsible to the extent at least that the premises are liable, under the statute, for the value of the material so furnished."

The case of *Howes v. Reliance Wire Wks. Co.*, 48 N. W., frequently referred to above, is important not only upon the question of actual delivery or delivery at a place designated by the owner, but not the building, but also upon the second alternative mentioned in the above analysis, i. e : assuming that there was no delivery at all, a tender of delivery would be sufficient to start the lien. In that case the Reliance Wire Works agreed to furnish

and put into position in the building a wire enclosure for the elevator. They proceeded to do the work by preparing this wire enclosure at their own shop and as soon as they had knowledge of the sale of the place and transfer to plaintiffs, they notified the plaintiffs of the contract and their readiness and willingness to deliver and put into position in the building the elevator enclosure which had been completed by them ready for delivery. The defendant i. e., Reliance Wire Wks., also formally tendered a performance of the contract in this particular which was expressly refused by the plaintiffs. This is all the delivery that was made, in fact there was really no delivery, but simply a tender of delivery. The court says that:

> "In these days a large portion of the material furnished for the construction of buildings, such as inside finishing, is prepared at the yard or shop of the contractor with the implied consent of the owner. Such work of preparation should be deemed part of the construction or 'furnishing' under the contract. It differs from a sale of merchantable articles or gross materials undelivered and which are of general utility. Of course if materials so furnished on construction by the contractor are diverted to other purposes by the contractor, or the contract is not completed, no liability can finally be enforced. It is otherwise where this occurs through fault of the owner of his assignee. It is true that the

> lien is based on the theory of increased value of the premises caused by the work or materials furnished, but where the work is interrupted or materials diverted through the fault or act of the owner, obviously the rule cannot be applied technically to defeat the lien."

The court allowed a lien to the extent of the actual loss sustained by the failure and refusal of the assignee of the original owner to allow the defendant to complete the contract.

Mr. Oakley used in the lower court certain cases, among them the case of *Barnett v. Stevens*, interpreting the word "furnish" as follows:

> "In order to furnish material for a building there must be either an actual or constructive delivery of the material at or near the building."

Evidently this language is confused in that the words "or constructive delivery" might necessarily be made anywhere.

The following cases are pertinent and establish the view that it is not necessary to place the material upon the building.

Evans Marble Co. v. Trust Co., 60 Atl. 667 (Md.)

In this case the contractor was to carve and cut the marble at a place known to be away from the premises, but was to complete it, put it in place and finish it in place. Delivery was not made.

See also

Every v. Hertig, 61 N. W. 83.

The distinction to be found in the words used in the various lien statutes is commented upon in the case of *Pittsburg Glass Co. v. Leary*, 31 L. R. A. (N. S.) 746, and it is there held that it is not necessary that the articles be actually used where a lien is given for the material furnished for the construction of and improvement.

Exhaustive notes on this subject will be found in L. R. A. 1918 D, 1043, and in this note the Colorado statute, which provides for furnishing of materials to be used in the construction of a building, is found.

See

Rice v. Castles, 108 Pac. 101;

Salzer Lbr. Co. v. Lindemyer, 131 Pac. 442.

We are of the belief that this court is constrained to follow the holding in the Minnesota cases, which approve constructive deliveries, since these cases have been definitely adopted in the *Western Hardware Co.* case by the Supreme Court of the State of Washington. We are confidently of the belief that this court will see the necessity of holding that constructive deliveries in specially fabricated material is the only doctrine that will protect such fabricator.

It is evident from a fleeting glance of the testimony of the experts for this appellant that such material is waste instantly that it is partially fabricated. Impliedly, therefore, the law delivers into

the hands of the owner this material when once fashioned.

The good faith of the Tacoma Millwork Supply Company is evident from the start to the finish of their contract. The decision of the lower court leaves this waste material on their hands, with a great bulk of the $65,000 represented in labor expended.

Where and in what particular has this appellant defaulted?

It completed its contract in time. It tendered deliveries in time. It stored at the direction of the owner, and certainly, at least, with his consent. It offered the court the right to enter an equity order transferring this material to the receiver of the Building Company.

But for the default of the owner this material would now be an integral part of the building. This is an equity court and our appeal is one that surely should reach the conscience of its chancellors.

Will counsel on the other side intimate, that with the far reaching powers that an equity court has, that this court could not devise a method to do equity in this situation to all?

The building is in need of this material. Placing it there under proper protection will enhance its value and will give added value, since the material is now ready. A favorable decree would, therefore, not only do equity, but would augument for the

better the standing of the other lien claimants on sale of the building.

This is not gross material that can be picked up anywhere or resold on the open market. It is specially designed. It must be remanufactured in exactly the same quantity and approximately the same price. It seems wholly inconceivable to counsel that under the circumstances detailed this appellant should suffer a loss of over $60,000, with no fault traceable to it, in any sense of the word.

Suppose, Your Honors, that thirty days after commencing the cutting on these designs the building company had failed and one-third of the work had been done on the fashioning of the material; that under the evidence no suggestion of delivery would have come because none of it was ready for delivery. Will counsel on the other side intimate to this court that the fabricator is without remedy in equity under a statute that says, "to furnish material for use in the construction of a building?"

We sincerely believe and urge with conviction that this appellant is entitled to its lien in full.

Waiver of Lien.

This subject is treated in pages 23 *et sequor* of of this brief, under the testimony, principally, of Mr. R. T. Davis, the manager of the Millwork Company, and his brother, George Davis. The manager, after discovering the waiver of lien clause and before signing the contracts, drew a rider reviving the lien in the event the Building

Company defaulted in payment, instructing the brother not to turn over the contracts unless the rider was accepted (Page 24) of this brief. The brother was then assured that the Building Company had $400,000 cash on hand; had a definite committment for $600,000 of mortgage monies; that the terra cotta people and the steel people had already signed identical contracts waiving the liens (Record p. 696) among other representations, and that with these assurances the Millwork Company delivered the contracts, submitting to the waiver of lien and relying upon the statements made. (Record pp. 699 and 700). The brother says that Mr. Drury and others told him that they had $400,000 on hand and $600,000 for completion monies; that if the contract was broken, as Drury said, the waiver would not hold; that the eastern finance people demanded this form of contract and they all must be alike. With these assurances the riders were detached. (Record pp. 705-707).

This evidence was verified by Miss Carlson, secretary to Mr. Webber, the architect, and by Elmer E. Davis, another contractor. That there was further representations that the $600,000 was a first mortgage on the property and that the building company was the full owner of the property subject only to this mortgage.

Mr. Davis, the manager, says that after the failure of the bank he found that the building company did not have $400,000 nor any appreciable part of it and did not have a committment on the

$600,000 mortgage. (Record p. 703). It is also in evidence that the McClintic Marshall Company and the Washington Brick, Lime & Sewer Pipe Company had distinctly reserved their liens at this time (See Exhibit F and 136, this brief page 25). Under these circumstances such a fraud was committed in the inducing of these contracts from the Millwork Company that the lien must naturally revive itself. It was distinctly represented, with full knowledge of the fraud, that $400,000 was at hand, out of which payments would be made and that $600,000 was a committment and was for completion monies.

A waiver of lien or an agreement rather to waive a lien is merely a contractual situation which must be supported by consideration and must be like any other contract free from fraud. In this case the real consideration for the waiver of lien was the agreement to pay these monies at stated times out of monies represented to be on hand. Consideration for the waiver was the substitution of these funds definitely as at hand. The money was not at hand, the mode of payment could not be followed, and the consideration for the waiver is therefore absent.

On the other hand the fraud which was perpetrated is so clear and succinct, it is no where in any wise refuted and it must now be admitted that these fraudulent representations relied upon by Davis and his brother were the inducing cause to the agreement to waive the lien; they were rep-

resentations of material facts, without belief in which the Millwork Company would not have proceeded; they were known to be false as to the $400,000; they were known to be false as to the waiver of lien by the terra cotta people and the steel people, and any business man should have known that the commitment, so called, was not a commitment, but a tentative offer of monies on conditions which were already broken in part when the Millwork Company's contract was signed. We are fully entitled to a re-establishment of this lien. See citation *Vansciver v. Churchill*, 35 Pa. Sup. Ct. 212. The court said:

> "We are not without authority that a covenant against liens procured by fraud will not be enforced."

In *Bollman v. Hermer*, 160 Pa. 377, it is said:

> "If the contract is not made in good faith, but is entered into for the purpose of misleading and so defrauding sub-contractors and material men, it should be held invalid because of fraud."

Citing among others *Bohme Bros. v. Seel*, 185 Pa. 382.

In the Vansciver case the owner falsely stated at the time of contract that each of the three properties to be set aside as security to the plaintiff was subject only to a mortgage of $1600, while at the time there was another mortgage of $25,000. There was other evidence of fraud to the effect that Churchill was not in actual control of these

properties and therefore could not set them aside as security to the plaintiff as he agreed to do when he procured the covenant against liens. The court said:

> "We think it is ample evidence to warrant the jury in finding that the contract against liens was void on account of the fraud practised by Churchill which induced the plaintiff to execute it."

In *Katzenbach v. Holt,* 12 Atlantic 383, the court will find a case almost similar to the one at hand. In that case Katzenbach & Co. held a mechanic's lien on Holt's property. One Manning had a mortgage which was secondary. Holt said to Katzenbach that if they would release their lien Manning would take a new mortgage for a larger amount and would endorse for Holt at the Bank, and that Holt would in this manner out of said mortgage and endorsements pay the liens. On the faith of this the release was made and delivered. Manning admitted that he had made such promises to Holt, but Manning, after receiving the mortgage and endorsing for a certain amount refused to endorse further. In the meantime Katzenbach had inquired of two officers of the bank which held some of Holt's paper, for which Manning was liable, as an endorser, as to Holt's standing and was induced to believe that he was in good condition. Katzenbach at that time explained to the bank the reason for his inquiries, going into detail as to the lien and Holt's plan. Shortly after the last loan

was procured by Holt, on Manning's endorsement, from the bank, the bank secured an assignment of the mortgage, referred to herebefore, from Manning as collateral. The court held that the bank could not plead this release of lien both because of the absence of good faith and because there was no valuable consideration. The court further stated:

> "I am lead to the conclusion that Mr. Manning cannot in equity be permitted to plead such release and ought to be enjoined from doing so at law, if such promises can be enforced affirmatively by third persons most assuredly they can be negatively."

In considering the bank's position the court said:

> "In the eye of the law they (the officers of the bank) perpetrated a wrong upon the claimants and can claim no benefits from the transaction."

And again:

> "The bank did not take the assignment until after all the papers that Mr. Holt offered, with Mr. Manning's endorsal, had been discounted and placed to Mr. Holt's credit."

And comments upon this that the bank gave "not the slightest consideration which the law requires in such cases."

This doctrine is well presented in the case of *Seattle Lbr. Co. v. Cutler*, 63 Wash. 662. In that case it was held that where the controversy is between the original parties that failure of consider-

ation for obtaining the waiver of lien, if proven, may re-establish the lien.

In *Central Trust Co. v. Richmond * * * Co.*, 41 L. R. A. 458, Justice Lurton, sitting then as a Circuit Judge, held to the doctrine we are contending for, said:

> "It may be admitted that lien laws do not in general creat a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any certain agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien * * * but it is clearly well settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanic's lien should exist, or where the contract is to pay in land or other specific article of property, yet if the owner fail to fulfill the agreement for such mode of payment or for different security it will not be taken as an agreement to waive the mechanic's lien in case payment is not made in the manner provided for * * *

Citing:

Grant v. Strong, 18 Wall. 623.

Citing from *McCleary v. Brown*, 91 U. S. 266, the court lays down this doctrine:

> "If the labor has been performed or the materials furnished no matter in what the owner agreed to pay, if he has not paid in any

way the laborer or mechanic has a right to resort to the security provided by law unless the rights of third persons intervene * * *

In the case of *Southport Canal Co. v. Gordon*, 18 L. Ed. 894, the court found that a release of lien was obtained by the company from a partner under a situation amounting to gross fraud and held it to be without any effect whatsoever in so far as it affected the partnership relation to the company.

The owners did not seek waiver of this lien, but in the testimony, the eastern syndicate sought this waiver. The first mortgagee alone, therefore, namely, the Metropolitan Life Insurance Co., can plead such waiver.

Paulson v. Wauke, 18 N. E. 275.

Arbitration.

The contract provides for arbitration, but this, of course, may be waived. The evidence shows that when Mr. Davis asked the president of the Building Company what should be done, after the failure of the Bank, he replied there was nothing to do but to file the liens and impliedly go ahead. (Page — of Record.)

Status of $600,000 Mortgage.

In this connection the first question that meets one's consideration is who is seeking to establish this $600,000 mortgage in whole or in part? Of course it is the Bank, through the receiver. Then

comes the question, did it pay consideration for this assignment of mortgage, and if so, whether there are any matters in estoppel that militate against its use by the Bank as collateral?

On the question of consideration:

On October the 7th, when it took the assignment of this mortgage from Simpson, the Building Company did not owe the Bank a cent by the way of loans. If there were any overdrafts at that time it was a past consideration. On December the 9th for the first time does this mortgage appear of record as among collateral of the Bank. On that day the loans which, at the date of November the 8th, stood at $150,000, were increased to $200,000, so that on that day when for the first time the Bank asserted a claim to this mortgage as collateral, as far as its records show the amount advanced of new money was $50,000. On this date, however, the overdrafts had accumulated.

If, therefore, we take the assignment date October the 7th as the date in which the Bank acquired title to this mortgage, if it ever did, all advances including overdrafts had already been made and it therefore paid no consideration for this mortgage. In this particular it is well to consider that while this is not a bankruptcy proceeding, the four-month period of inhibition as to previous transfers should in moral law apply because, under our statute, the proceeding taken by the Bank Examiner is the only one available and is exclusive. If the later date of December 9th is taken as the time

the Bank acquired this mortgage as collateral, then of course the only new money that was advanced at that time was $50,000, and this of course was within the inhibited period as well.

It will therefore be seen that insofar as new money is concerned $50,000 is the total limit as to which the Bank might claim consideration. But there was an overdraft at that time still to be taken into account.

However, we do not need to consider this point any further for the following reason: the Bank was imbued with notice of all the chicanery and fraud that had gone before, was imbued with notice that this mortgage represented a trust fund useable for specific purposes and none other.

In this connection we go back at once to the representations made to the Davis boys, viz: that this mortgage was for completion monies, was a first mortgage upon the property involved, and that its monies would be expended solely for labor and material in the final completion of the building, and that the Building Company had ample funds to be known as the primary funds and had $400,000 on hand. Who made these representations? It was Drury and Larson, and these two men, one the president of the Bank and the active worker in the Building Company, and the other the chairman of the board of directors of the Bank, and the president of the Building Company. Again Mr. Sheldon was secretary of the Building Company and the vice-president of the Bank. He testi-

fied that both boards let Larson and Drury do it all. Williamson testified in like effect; Lindberg so testified. Chilberg was away most of the time, Jafet Lindeberg was away a great part of the time. Thompson was sick during the entire period. Lamborn stated that they left everything to Larson and to Drury, and so we come to this conclusion that these boards of directors acquiesced in all that Larson and Drury did and are bound by their representations made in the ordinary course of the business. The representation that this was a first mortgage was made by both Larson and Drury repeatedly. The representation that they had $400,000 on hand was also made repeatedly by Larson and Drury to these contractors. Drury knew better as did Larson, but Drury, in order to execute the purposes he was engaged upon said to R. T. Davis: "If you have any doubt about our having the money on hand I will take you down to the Bank in the morning and you can draw money in advance." And the following morning he received $15,000 on his contract, and Larson okehed the extensions on the note which was after Drury represented tentatively that the $15,000 would be applied on the final end of the contract. The status of this mortgage, therefore, is definitely fixed in our judgment as a first mortgage upon these properties, the proceeds to be used solely for completion monies, and the Bank is absolutely estopped from using this mortgage in its protection and for its benefit because of the representa-

tions made by its own agents in the interest of a company that it owned. This question will be considered in its law phases in the next subject. Finally Larson admits that the only reason he took over this mortgage was because he feared that Simpson might die and that the mortgage might become entangled in Simpson's estate.

(See page 13, this brief, Record p. 1005, *et sequor*, and particularly Record pp. 1049-1050).

The Mortgage For $600,000 Was Not a Contract For Future Advances.

This mortgage, under the tentative so-called commitment was not a contract to give over monies definitely at fixed times and under an obligation under which the Metropolitan Life Insurance Company was bound. It is therefore not prior to the mechanic's liens.

See *Ray v. McClellan*, 124 Mass. 92.

Aliss-Chalmers Co. v. Central Trust Company, 190 Fed. 700.

The Contract Is an Entire Contract.

The contract itself decrees that it is indivisible and in entire.

On the question that this is an entire contract the general rule is that the intent of the parties will govern. See *Toellmer v. McGinnis*, 24 L. R. A. N. S. 1082:

> "The safest and best course is to ascertain what was the intention of the parties from the instrument they have executed."

In the case of *Chamberlin v. Booth and McLeroy*, 25 L. R. A. N. S. 1223, the court says:

> "If a general rule be subject to many exceptions where a contract requires successive steps * * * the covenants which relate to the taking of these steps are mutual and dependent."

In the case of *Davidson v. Gaskill*, 38 L. R. A. N. S. 692:

> "The rule is that where one party contracts to do certain work, and the other to pay a certain price for the same the contract is entire."

In 13 Corpus Juris, page 569, Subject Contracts, section 538, the doctrine is that agreements are mutual and dependent where performance by one party is conditioned on and subject to performance by the other. It is held that intention is the true test "to be determined from the sense of the entire contract rather than from any particular form of expression." And in case of doubt covenants are construed as dependent since such a construction ordinarily prevents one party from having the benefit of the contract without performance of his own obligations. *Lowker v. Bangs*, 17 Law Ed. 768.

In our case in addition we have the expression clearly put that this contract is held to be an indivisible and entire contract. This appears in the article relating to installment payments.

UNITY OF CORPORATIONS.

This subject is treated of at pages 8 and 9 *et sequor*, of this brief and in the Record at pages 978, 1102, 1103, 1125, 1136, 1147, 1153, 1159, 1033, 1042, 1084, 1093, 1172, 1174.

Distinguishing between a doctrine of unity of corporations and notice or knowledge brought home to a corporation, we submit that the Building Company having been organized by the Bank for the sole purpose of limiting liability, it became of course merely a shadow or representative of the Bank. But its governing officers were Larson and Drury, and these were the principal officers of the Bank and were the controlling spirits of the Bank, and, as the evidence showed on the witness stand, practically everything was left in the Bank to Larson and Drury, and particularly to Larson. So that anything in the ordinary course of business that arose in the Building Company must of necessity have been known to the Bank, by the doctrine that where the agent or agents are the sole representatives of both parties in the given transaction, each party must have had equal knowledge of any situation coming forward. This is held in *First National Bank v. Blake*, 60 Fed. page 78, and again in the case of *Emerado Farmers Elevator v. Farmers Bank*, 29 L. R. A. N. S. 567. There is cited the case of *Niblack v. Casler*, 74 Fed. 1000. In the parent case they deal with this specific rule:

> "That in any event the rule above referred to that the principal cannot take the benefit

> of the transaction conducted by its agent obstensibly on its behalf without assuming full responsibility not only for his acts but for knowledge, applies with all its force."

And the doctrine of sole agent overrides the doctrine that if such agent is acting adversely the Bank would not be bound.

It was suggested by counsel for the Receiver that the minutes of a corporation alone furnish the evidence of corporate acts and corporate authority, but in the case of *Woods Lumber Co. v. Moore*, 11 A. L. R. 553, 554, this doctrine is overturned. The court said, quoting from another case:

> "If a corporation allows its officers to continue its business and third persons act upon apparent authority it is shown it cannot defeat the rights of such persons arising from transactions done and completed under such obstensible authority by failing to enter upon its minutes any order giving its officers authority to act."

In the case of *Cook v. American Tubing Co.*, 9 L. R. A. N. S. 211, the court in quoting from 4 Thomp. Corp., Secs. 5192 *et seq.*, says:

> "Knowledge acquired in a previous transaction being present in the mind of the agent when acting in the particular transaction. In like manner the Supreme Court of the United States have held that the rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the

> agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present in his mind at the time when he is acting as such agent, provided it be of such a character as he may communicate to his principal without a breach of confidence."

Citing *Harrington v. U. S.*, 20 L. Ed. 167, the court again refers to the subject that if an agent is acting adversely to a Bank such notice cannot be imputed. The court however, said, after recognizing this subject in the case of *First National Bank v. Blake*, 60 Fed. 78:

> "But there is no room for the application of this principle where the agent is the sole representative of both parties in the transaction. * * * If he was the sole representative of each party each must have had equal knowledge."

Citing many cases, among others *Waynesville National Bank v. Irons*, 8 Fed. 1, the court speaking of the case of *Morris v. Georgia * * * Co.*, said:

> "Where an individual has an interest in a promissory note which he knows was given without consideration, such individual, as cashier of a bank, having full authority of the bank without reference to or consultation with any other officer of the bank, discounts such note with the funds of the bank, the latter is

not a bona fide purchaser of the note without notice."

In *Brookhouse v. Union Publishing Co.*, 2 L. R. A. N. S. 993, while this case turns upon the point that the interest of the agent was adverse the reasoning of the case is in our judgment worth great consideration, for it points out the exceptions and distinctions, and the particular objection is the one that the bank would not be held when the agent is engaged in this manner in an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. In our case of course the acts of Larson and Drury were in the interest of both the Building Company and the Bank and in no sense in the interest of either individual excepting indirectly and incidentally as they were interested in both institutions.

The case of *Emerado Farmers Elev. Co. v. Farmers Bank*, 29 L. R. A. N. S. 567, holds in this case a cashier of the bank, who had entire management, control and conduct of its affairs, and particularly of the receiving and disbursement of deposits through checks on an elevator company of which he was treasurer, payable to the bank, presented such checks and paid them himself misappropriating the funds, the court held the bank to have had full knowledge of the fraud. Citing *Niblack v. Cosler*, 74 Fed. 1000. The authorities on this subject are quite carefully collected in an annotation

to *Wheatherby v. Texas & O. Lbr. Co.*, 7 A. L. R. 1446 *et seq.*

In the *Wheatherby* case the court concludes with this comment:

> "If he had acquired this notice while acting for himself in his own private business affairs it would not be imputed to the Texas & O. Lbr. Co., but since he acquired the notice while transacting business for the lumber company, such notice was in law imputed to the company."

In our case Ole Larson and Drury were in each act of theirs operating as well for the Bank, since the Bank owned the Building Company, as for the Building Company which was but a tool or cloak for the Bank.

Status of $70,000 Mortgage.

We do not wish to take much time on this subject, since we think that Judge Cushman has reached the real solution on this in that the Bank gave a full warranty deed to the Building Company, which went on record, it was therefore encumbent upon the Bank sooner or later to cancel this mortgage. It is now attempting to foreclose that mortgage against the estate of the Building Company in the face of intervening adverse rights on the part of the lienors.

We want to make this point, which we think has not been forcibly enough presented to Your Honors, viz: that even prior to the payment of this mort-

gage the Bank had already provided for its cancellation. We do not mean by the check for $70,000 that was taken east by Mr. Larson, but in a totally different manner which is clearly evident from Mr. Ogden's testimony. He was the cashier, if Your Honors will remember.

When counsel was interrogating him upon the question of when he first saw the note for $350,000, he said that it was shortly after the failure of the Bank. Two sums make up this $350,000, one $280,000, the equity in the building, the other $70,000, this mortgage. We cite pages 738 *et seq.*, testimony of Mr. Ogden. And Exhibit No. 235 was introduced at page 742, on that page: These page references in the Ogden and Sheldon testimony are from the original record. We took the liberty of quoting the exact language because of its importance:

> "Q. 'Referred to in this Exhibit 235, which makes up a part of that $9,000 interest charge; interest on banking house investment, 6% on $350,000 from December 1st to December 31st, 1920?'
>
> A. 'Yes, that is the amount for which they carried the banking house.'
>
> Q. 'That is the old banking house?'
>
> A. 'Yes.' "

Mr. Oakley then shows Mr. Ogden at page 745, Exhibit 226, a statement of the Bank at the close of business May 4, 1920, "And call your atten-

tion to the item there $280,000; what does that item represent?

> "A. 'That is the investment in the two corner lots, less $70,000 mortgage on the lots.'"

This is exclusive of the Drury lot which was rated at $65,000. Mr. Ogden repeats, at page 749, this situation in this manner:

> "A. 'Well, on the report of the bank commissioner, the lots were put in at $350,000 less the $70,000 mortgage, showing the Bank's investment of $280,000.'"

Mr. Sheldon clearly shows now that this $70,000 mortgage was arranged by the Bank to be paid out of the $350,000 second mortgage bonds, which was the total investment in the building according to the Bank's own records, *conditioned that they paid the $70,000 mortgage.* Mr. Sheldon says, page 752:

> "A. 'The bonds had not been delivered to the Bank according to the agreement between the Bank and the Building Company, and the Bank was holding nothing at the time; that was the reason the note was executed, so that the Bank would have something to show for the deed that they had deeded.' (Meaning the Warranty Deed.)
>
> Q. 'Isn't it a fact that it was and did represent, and its purpose was to evidence the $350,000 second mortgage bond?'
>
> A. 'The note never would have been used if the bonds had been delivered.'

Q. 'How did you make it up?'

A. 'What is that?'

Q. 'How did you make it up, the total?'

A. 'If I remember correctly, it was $350,000 with some interest on it.' "

Further, at page 754:

"Q. 'This note was not given over to represent a loan or anything of that kind?'

A. 'Not if the bonds were delivered, no.' "

At page 753, Mr. Sheldon says: "The second mortgage bonds were to be $750,000." Deducting the $400,000, that the building company claimed it had, which it is apparent from later testimony was in their minds, would be derived from this differential in second mortgage bonds, leaves $350,000 second mortgage bonds.

Without attempting to take any more of the court's time on this matter, it is significant that the Bank had already arranged to take for its protection second mortgage bonds for this Penn-Mutual mortgage. It was, therefore, a simple matter for it to give a warranty deed at the time. It did not in the meantime obtain the mortgage bonds, but it did obtain this note of $350,000 plus interest that both Ogden and Sheldon spoke of, in lieu of and as an interim substitute for the bonds. It already had a certificate for such bonds.

"A. 'The note never would have been used if the bonds had been delivered.' " (Page 752 testimony of Mr. Sheldon.)

The Bank, had it received the second mortgage

bonds, would have been in the position it is today so far as these lienors are concerned. It had warranted the building and as against them its $350,000 of second mortgage bonds would have been subsequent. It put itself in the status not of a lienor, but of a simple creditor when it took the $350,000 note, unless in equity that note might be tied in to the second mortgage under the reference made on page 743 to language on Exhibit 235. In that event of course it would be simply a note secured by the same type of second mortgage and subsequent to the lienor's claims.

Thus it appears clear that in good faith this Bank gave this warranty deed under an arrangement that it would be fully protected by second mortgage bonds wiping out the $70,000 mortgage. This arrangement was made before February 20, 1920, when this lienor did its first work. See page 17 of this brief, Record p. 1005, *et sequor*, and particularly pages 1034-35 and the resolutions authorizing the president and cashier "to execute and deliver to said Scandinavian American Building Company a warranty deed of conveyance to said Lots 11 and 12, in Block 1003, Map of New Tacoma, W. T., upon receiving from said Scandinavian American Building Company a certificate * * * agreeing to deliver to said Scandinavian American Bank of Tacoma * * * bonds of the par value of $350,000."

It needs no argument on both these mortgages to convince the court that in the $600,000 mortgage

we have a trust fund for the completion of this building and that as to the $70,000 mortgage the Bank had the certificate for the $350,000 of second mortgage bonds and had granted a warranty deed to the Building Company. Upon this title and this state of facts this appellant relied.

Status of Millwork Company's Material and Labor.

As previously stated, we believe we are entitled to a full lien for material on the $65,000 contract; we would be in the relation of labor work similar to that of E. E. Davis, the erector of the steel on the $31,266 contract, and we would be straight out subcontractors on the Bank fixtures contract, amounting to $2,100.

It was suggested by Mr. Metzger in the lower court that because we both fabricate and agree to erect the general contract for materials, that that makes us a subcontractor. In other words, that though we carefully entered into *one contract for fabrication* in contemplation that the *other one was also to be entered into for erection*, and *entered into a third one at the same time practically which was to be for fabrication and erection both*, that they must all be thrown into a hotch potch and considered as one contract. The simple statement of this situation we think should settle the matter; that under the material contract we are compelled to give one type of bond, having certain conditions, restrictions and penalties, under the erection contract we had to give another type of bond with

different restrictions and penalties, and so with the third and subcontract.

It is axiomatic that the law will presume that the contractor had in mind the benefits arising on entering into a different status when he executed the three different contracts. It is further suggested that the use of the words: "put in place" in the material contract suggest installation. It is our contention that that simply means delivery at the place for erection. First of all we can answer this by stating that the material contract was entered into in contemplation that there would be an erection contract. In the erection contract, Your Honors will find in substance this expression: "It is understood that the owner will set the window frames and furnish and set the door bucks and grounds." The material contract itself says in substance: "Owing to the great quantity of the work and our limited storage facilities it will be necessary on this account for you to provide dry storage space and accept delivery as fast as manufactured." The general contract says: "Furnish you with all the millwork." It is also significant that the fabrication contract and the erection contract ran concurrently. In this particular it might also be suggested that there was a $50 penalty per day, and one can readily see why the Millwork Company was urging Wells to take delivery. The erection contract does not use the words "put in place," but says in effect: "All work as mentioned to be delivered and erected."

In *Neary v. Puget Sound Engineering Co.*, Vol. 14, No. 1 Advance Sheets, Wash. Decisions, page 18, we find this: In that case, by contract, Harmon was bound to deliver the material on the work as directed and required. The question was, was Harmon a subcontractor? He was delivering gravel. The court said:

> "In many cases, under modern conditions, material men deliver their material upon the works where it is to be used * * * *at the place where they are to be put into the building.*"

We cite this language merely to show that it is practically in harmony with the language used "put in place." Harmon was held to be a material man. Another very distinguishing feature is that the material man's labor workers fabricating the material would have no lien under this case.

Speaking from another case, in the parent case, the court said:

> "Bates merely furnished the sand and gravel used in the work just as someone else furnished the cement, and someone else the steel. If he was a subcontractor then every material man would fall within that class, and the distinction manifestly intended by the statute would be obliterated."

More pertinent in this case: *Findley v. Tagholm*, 62 Wash. 341, the court says:

> "If one who furnishes the sashes, doors and glass for a building is a subcontractor, every

material man would fall in that class, and such construction would nullify the plain terms of the statute."

Suit on Contract or Quantum Meruit or For Foreclosure of Lien and Reformation of Contract by Reviving Lien.

We merely cite on reformation the cases of:

Walden v. Skinner, 101 U. S. 577.

Hunt v. Rousmanier, 8 Wheaton 174, 211.

34 Cyc. 912, Subject, Fraud.

Dolvin v. American Harrow Co., 28 L. R. A. N. S. 785.

We have already submitted the doctrine of law that in an equity cause a plain statement of facts will give relief under general prayer for relief that the party is entitled to in a judgment of the chancellor.

We did say, at page 381 of the record, in answer to a statement by Mr. Oakley: "They are relying upon this contract and I think the contract prices should control."

> Mr. Flick: "We are not relying on the contract, Mr. Oakley. There will be no question but that the contract was breached by them and we are not relying on it."

Then on the same page we suggested to the court that the reasonable value is less than the contract price. (These two page references are from the original record).

The Millwork & Supply Company thereupon was putting its testimony in on the basis of reasonable

value, but in no instance in excess of the contract prices. Mr. Metzger suggested in the trial court that we must either sue for reasonable value or under the contract, but his own case, upon which he relies in large extent for one principle, viz: that we could not rescind as to some provisions and not as to others, holds that there is yet a third mode of procedure, viz: a general suit for enforcement of mechanic's lien. We cite from the case of *Girouard v. Jasper*, 106 N. E. 850, submitted by Mr. Metzger:

> "The petitioner does not contend that he was fraudulently induced to enter into this provision of the contract and as he has waived the fraud, if any existed, relative to the existence of the mortgages, he is bound by all of its terms."
>
> "On discovery (of fraud) he could have rescinded it as a whole and have brought an action at law for his breach, or he might have brought an action declaring upon a *quantum meruit* * * * or he could have availed himself of the remedy provided for the enforcement of a mechanic's lien to recover for the value of the labor and materials furnished."

The *Girouard* suit was one in which fraud is held to have been waived. In our suit the fraud has not been waived. The very foundation of the suit is the plea of fraud and misrepresentation inducing a contract wholly different from that which would have been executed by the lien claimant had

it known the true facts. We are familiar with the principle that one cannot ordinarily rescind in part and still get the benefits of the contract, but that is ordinarily a law situation and not a rule governing an equity suit, for in almost every equity suit where reformation is sought there is an approval and rejection in part. If this type of suit were not permissible one would have no reformation cases.

Ordinarily a failure to make interim payments will not abrogate an express lien waiver. This must be based upon the presumption that these are divisible items in the particular contract, or that the interim payments, by the wording of the contract, are not connected in any way with the lien waiver. See *Dux v. Rumsey*, 190 (Ill.) Appeals, p. 234. This was a subcontract case with undoubted rights intervening on the part of the owner and others. No fraud is pleaded or proved, no overreaching is suggested, no reformation is asked for, and the suggestion gathered from the case is that the lien waiver was not an independent covenant, and there was but a promise to pay in the ordinary way without reference to any particular mode of payment.

This case differs radically from our case in the many features just mentioned. A partial rescision may be allowed where the contract is of such character as our contract is held by the cases cited in 6th Ruling Case Law on Contracts, Sec. 318.

The *Rumsey* case is cited in 13 A. L. R., p. 1081.

In that same volume and the same annotation the authority is found upon which we rely in part, known as *Vansciver v. Churchill*, 35 Penn. Sp. Ct. 212, to the effect that where an owner falsely represents to a contractor that the property or securities out of which he was to pay the contractor, that the covenant against liens so obtained would not be enforced (see p. 1089). The doctrine of this case is re-affirmed in a number of Pennsylvania cases.

Ballman v. Heron, 160 Pa. 377;

Bohem Bros. v. Seel, 185 Pa. 382;

and particularly the statement by Justice Lurton, sitting then as a circuit court judge in 41 L. R. A. 458.

In this connection it is well to state that without allegation of fraud, its proof and request for general relief, we could not sue under the third mode suggested in the *Girouard* case, viz: general suit for foreclosure of lien.

See also

Rolevitch v. Harrington, 6 L. R. A. N. S. 550.

Again in the *Medical Society* case, 208 Fed. 899, citing the well known equity rule the court said in effect, that a Federal court is empowered to give such relief as the justice of the case demands in the eyes of the Chancellor, at any stage of the case, in the face of mistake in procedure.

In the case of *United States v. Behan*, 110 U. S., at page 171, the court said:

"In a proceeding like the present in which the claimant sets forth by way of petition a plain statement of the facts without technical formality, and prays relief either in a general way or in an alternative or accumulative form, the court had not ought to hold the claimant to strict technical rules or pleading but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition."

Again:

"Where a writing, owing to a fraud of one of the parties and mistake of the other, fails to express the agreement at which they arrived, reformation will be allowed."

(Vol. 3 Williston on Contracts, Sec. 1525.)

"The grounds for the reformation of an instrument are that it fails to express the intentions of the parties thereto as a result of mistake, fraud or inequitable conduct. * * *"

(23 R. C. L. Reformation of Instruments, Sec. 14 and Sec. 21.)

Particularly is this true "If reformation is essential to protect from injury the innocent party thereto." Citing *Phoenix Ins. Co. v. Bailey*, 13 Wall. 616; *Dickson v. Patterson*, 160 U. S. 584.

And

"Whether the deviation from the agreement is the result of intentional or unintentional

misstatement of the defendant is immaterial for equity has power to correct it as well in the former as in the latter case." (Id.)

So taking these authorities under consideration, if it is insisted that we are suing on the contract, it is a simple matter for Your Honors to reform the instrument by striking the waiver of the lien clause which was inserted in the belief that all would be treated alike and that two funds were at hand and available out of which specifically this lien claimant and the others would be paid, 1st: the $400,000 cash fund; 2nd: the $600,000 mortgage commitment fund. Once the instrument is reformed the rights of these lien claimants to sue upon the instrument could of course be granted. The pleading suggests "reasonable and agreed prices." The exhibits clearly portray the prices which, as the evidence shows, are practically the contract prices, which are likewise reasonable value. The exhibits also show the anticipated profits so that there is nothing now to be added, if Your Honors please, to the pleading or to the exhibits mathematically portraying this lineor's claims, nor in fact is anything lacking in proof.

If appellees say that we are suing on contract and cannot do this we can answer them that the reasonable price and reasonable profits are stated. If they say that we are not in a position to sue for reasonable value because we have used the term contract in the evidence and have asked for profits, we can say that this court has

full power to reform the instrument under the pleadings and the facts so that we may, without fear of technical difficulty, sue upon the contract. The contract is then not adopted in part only, but the contract is then adopted in full with all of its provisions as they would have been had the fraud not been committed.

We, however, submit that we are suing on a reasonable value and that the two items, one of $6,000 and one of $1,000 for profits are based upon the profits that would have been earned had the entire contract been completed. These are fixed items. If we are not entitled to them we must and readily do waive them.

We beg to cite the authorities submitted by Mr. Stiles:

Rem. & Bal. Sec. 1130.

Davis v. Thurston, 119 Wash. Dec. 265.

Burroughs v. School District (Wis.), 144 N. W. 977.

"Where performance, under the contract has advanced to a point where it may be determined from the contract what payment plaintiff is entitled to, for the work already done, his measure of recovery is properly the contract price for the part of the contract which has been performed, together with the profits which he has lost from being prevented from performing the remainder of the contract." 17 C. J. p. 858.

Attorneys Lien.

That appellant is entitled to have added to a judgment sought in this court an attorneys' fee commensurate with the amount and work involved. This subject is related to assignment of error number three.

We need only say that the lower court allowed an attorneys' fee of $500 for a recovery of about $4,000 and that in the event that recovery is made in addition in this court a fee commensurate with other fees allowed by the lower court should be granted.

Priorities.

Without referring to several assignments of error relating to this subject, we beg respectfully to submit that this appellant is entitled to full priority with other lien claimants as a material man, as an erector of that material in a second status, and as subcontractor in a third status. In other words, as to the $65,000 contract, the Millwork Company is solely a material man, as to the erection contract, if there is any preference to be given in such a position over a subcontractor, the Millwork Company is entitled to such preference on the $30,000 contract. It is a subcontractor as to the bank fixtures.

We sincerely submit there should be and can be no preference given the Bank or the receiver for the Building Company over this appellant's claims nor to anyone else similarly situated.

Summing up the entire controversy so far as

this appellant is affected by its various points of contact, we beg respectfully to submit in conclusion:

First—That there was absolute unity of purpose between the Bank and the Building Company, and its officers were either each of them aware of what was going on in both concerns, or were voluntarily leaving all duties to Larson and his assistant, Drury. That all the representations made by Larson and Drury were in the interest of erecting this building which was to belong to, and did belong to the Bank.

Second—That such representations were made in the interest of getting the building up, a thing the Bank desired. There was no hostility to the Bank in such representations and there was no interest adverse to the Bank in Larson and Drury in making these representations, and the Bank, therefore, is bound by all representations made, under the doctrine that Larson and Drury were acting as sole agents for both concerns, one the president of the Bank and a director in the Building Company, the other the president of the Building Company and chairman of the board of directors of the Bank.

Third—The representations were false and known to be false when made. The first representation was that they had a fund of $400,000 cash on hand with which to begin the building. The Building Company did not have a cent on hand when this representation was made.

The second representation was that they had a definite, final commitment for $600,000 as completion monies to be used solely for this building. They had no such commitment and knew they had not even complied with the tentative offer made by the Metropolitan Life Insurance Company, since individual bonds were required, which were never submitted and, in fact, never discussed with several of the prospective obligors.

Again Drury said to Davis, "This is a mutual thing if we fall down on our payments the law of the state is that your lien will revive," and by this third suggestion induced Davis, in conjunction with the assurances already given, to detach the rider reviving the lien if payments were not made.

The Bank stood by as the sole beneficiary of these promises and assurances, with full knowledge that they were being made. It is now seeking to destroy the $600,000 first mortgage, which was for completion monies, by claiming it has made some advances to the building on the faith of that mortgage. It definitely knew that the only other hope or source of money was the $400,000 of second mortgage bonds to be issued. If it has any rights for advances it must be relegated to an equity in such second mortgage, for that is the fund, as we now know, that the $400,000 was to arise from, a fact carefully kept from each and every contractor.

The Bank is seeking to foreclose a $70,000 mortgage, protection against which had been recorded in

the full warranty deed given by it to the Building Company. It controlled the Building Company and there was not the slightest excuse on its part, holding all of its stock, in not compelling the Building Company to execute and deliver these second mortgage bonds. They were due in four months and all that the bank needed to do was have them executed. It is now resting upon its own derelection, in not having these bonds constructed, in saying through Mr. Oakley's brief, that the Building Company had not fulfilled the agreement under the certificate for these bonds, and, therefore, the Bank need not fulfill its warranty. But intervening rights on the part of these lien claimants cannot thus be brushed aside. The Bank agreed to clear this property except for the $600,000 mortgage. When it did so, through the receiver or special deputy, it did what a court would compel it to do before it could have entrance into an equity court.

Taking the $600,000 mortgage; this was taken from the Building Company without any formal assent and pledged with the bank for such things as the advance of the $65,000 for the purchase of the Drury lot; for apparently the payment in full of the stock of the Building Company in the amount of $200,000, even for the interest on these amounts and for, as it is claimed, security for the very second mortgage bonds in the amount of $350,000. The demands by the Bank in this particular are, therefore, entirely outside of the contractural or

legal relations existing and formulated between the parties. At this junction we would like to adopt the authorities submitted by the attorney, Mr. Holt, of the Far West Clay Company on the subject of mortgages.

On the question of deliveries we simply say, in conclusion, that gross material, ordinary raw lumber for instance, can be sold again on the open market. That that is delivered, when there is room for it, it is naturally accorded a lien. Interior finishing, in fact most specially fabricated material, is useless for later deliveries. This fact is outstanding that it is ordinarily useless elsewhere and in larger cities it is impossible to deliver at or near the building any large quantity of finishing, terra cotta or structural steel. The lien must, therefore, arise with its fabrication and willingness to deliver it. No other doctrine will eke out the liberal intent of the lien act. Today the various lien claimants who are interested in this building would put up most strenuous objection to the taking of the finished material from the two warehouses and leaving it at nor near this open building, for they well know that it would lose its value in the course of a few short weeks of winter weather. This, alone, should answer the contention of each and all of those lien claimants who, in comfortable security of established liens, are seeking to have rejected this appellant's claim.

We respectfully submit, therefore, that we are

entitled to a reversal of the decree to the extent of our claim not allowed.

We are seeking the establishment of our values under the statute and not under the contract, but in determining those values we sincerely believe that the holding of the Supreme Court of the State of Washington entitles us to a lien for profits. If this court should hold with us on this particular we would be entitled to $69,507.83, with interest from January 15th, 1921, and in the event that this court should hold that we are not entitled to profit the two items, one of $6,000 and one of $1,000 would be deduced, and we would be entitled to $62,507.83, with interest and commensurate attorneys' fees and costs.

Respectfully submitted,

EDWIN H. FLICK,
CHARLES H. PAUL,
Attorneys for Appellant,
Tacoma Millwork Supply Company.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, JR., as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation,

Appellant,

vs.

McCLINTIC - MARSHALL COMPANY, a corporation, et al.,

Appellees.

RECEIVER'S OPENING BRIEF

GUY E. KELLY,

THOMAS MACMAHON,

Attorneys for Receiver.

1005 Rust Building,
Tacoma, Washington.

Filed this .... day of February, 1923

FRANK D. MONCKTON, Clerk.

By .... Deputy Clerk.

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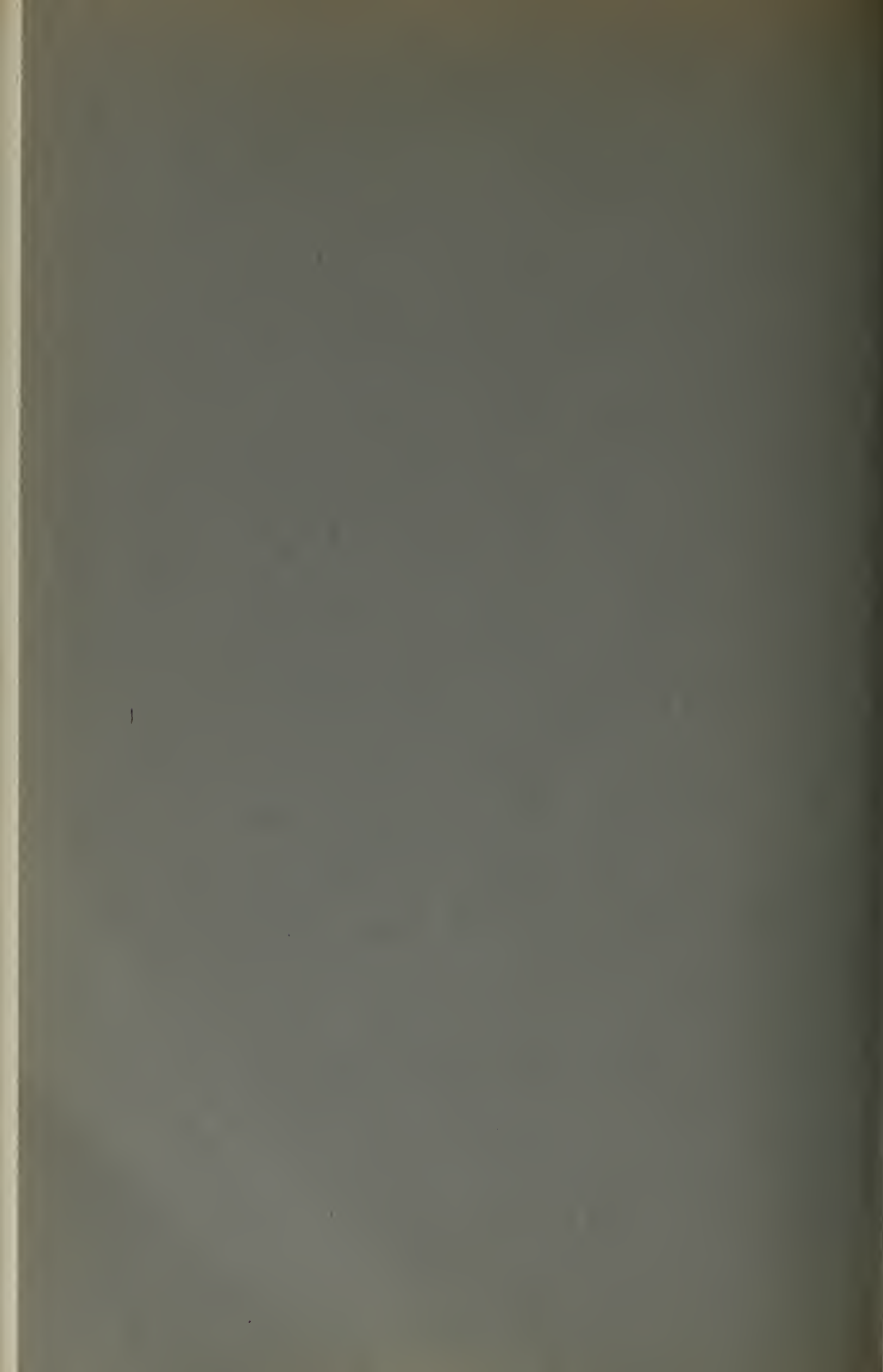

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RECEIVER'S OPENING BRIEF

Statement of the Facts

This action was instituted by the McClintic-Marshall Company to foreclose a materialman's lien upon real property owned by the Scandinavian American Building Company, a Washington corporation in Tacoma, Washington, on January 18, 1921. In accordance with the Washington statutes giving such lien, all other lien claimants and all persons having or claiming an interest in the property were joined as parties defendant, except the

Penn Mutual Life Insurance Company, which then held a prior mortgage on the property. Among other defendants the complainant joined Claude P. Hay, as Bank Commissioner of the State of Washington, in charge of the liquidation of the Scandinavian-American Bank of Tacoma, an insolvent banking corporation, and his deputy, Forbes P. Haskell, Jr. Thereafter the office of Bank Commissioner was abolished and the duties of the Bank Commissioner conferred upon an official designated as "The Supervisor of Banking of the State of Washington" J. P. Duke, was appointed by the Director of Taxation and Examination of the State of Washington to the office of Supervisor, and as the successor in office of Hay, appeared in this action.

The joining of Haskell as Deputy, we think, was clearly improper, but because of the facts hereinafter stated it may be somewhat confusing, and for that reason we are calling particular attention to it.

After the institution of this action the State Court appointed Haskell to act as Receiver of the defendant, Scandinavian-American Building Company, and thereafter an application was made in this action for the appointment of a Receiver for the Scandinavian-American Building Company. The District Court followed the lead of the State Court and appointed Haskell, who was thereupon discharged by the State Court. The appointment of Haskell was really done in the interest of economy, he having agreed to serve as Receiver without

compensation. The following is the order appointing him (Tr. p. 52):

This matter coming on regularly to be heard upon the application for the appointment of a receiver for the assets of the defendant, Scandinavian-American Building Company, a corporation, which said application was made by the defendants, Ann Davis and R. T. Davis, Jr., executors of the estate of R. T. Davis, deceased, and Ann Davis and R. T. Davis ,Jr., et al., copartners, doing business as the Tacoma Millwork Supply Company, the Complainant herein appearing by its attorneys, Messrs. Hayden, Langhorne & Metzger, the applicants appearing by their attorneys herein, Messrs, Flick & Paul, and the defendant, Scandinavian-American Building Company being represented by its attorneys, Messrs. Guy E. Kelly and F. D. Oakley, and the attorneys for the complainant and applicants having presented their petition for the appointment of a receiver, and the defendant, Scandinavian-American Building Company, having filed affidavits in resistance thereof, and the Court having considered the same, and being fully advised in the premises,—

And it appearing to the Court that F. P. Haskell, Jr. is a suitable and competent person to act as such receiver,—

IT IS THEREFORE ORDERED, That F. P. Haskell ,Jr., be, and he hereby is appointed receiver of the defendant company, and that said receiver be, and he is hereby authorized and directed

to take possession of all of the property and assets of the defendant of every kind and description; that said receiver be, and hereby is authorized and directed to employ such necessary caretakers and assistants as he may deem necessary to protect the property of defendant during receivership; that said receiver file in this action his oath as such receiver in due form of law, and *the* he file a bond as such receiver as required by law for the faithful performance of the duties involved, the amount of which bond shall be in the sum of $10,000.00, and shall be approved by this Court.

IT IS FURTHER ORDERED, That Guy E. Kelly be, and he hereby is appointed attorney for said receiver.

Done in open court this 23d day of March, 1921.

EDWARD E. CUSHMAN,
Judge.

So Haskell is a proper party to this action, not in his official capacity as a state official, but as a receiver appointed by the District Court in this action, and as such Receiver he has appealed to this Court from the Decree.

The defendant, Scandinavian-American Building Company was incorporated in November, 1919, under the laws of the State of Washington, with power to acquire and improve real property, and for that purpose to borrow money (Ex. 179, Tr. p. 985). The particular purpose was to erect and operate an office building upon Lots 10, 11 and 12 in Block 1003, Map of New Tacoma, in Tacoma,

Washington.

For that purpose in February, 1920, it acquired title to Lot 10 from Charles Drury, its President, paying therefor $65,000.00, and acquired title to Lots 11 and 12 from the Scandinavian American Bank of Tacoma under an agreement whereby it agreed to place a $600,000.00 first mortgage upon the three lots and a $750,000.00 second mortgage thereon, the second mortgage to secure a bond issue of that amount, and to erect with the money derived therefrom a sixteen story modern office building and to provide upon the ground floor thereof space for a banking room, to be reserved for the use of the Scandinavian-American Bank of Tacoma, at a rental to be agreed upon, and agreed to deliver to the Bank bonds of the par value of $350,000.00 out of the second mortgage bond issue, before June 10, 1920. (Ex. 184, Tr. p. 1020 et seq.)

Prior to that time one G. Wallace Simpson, an eastern bond broker, had secured and agreement from an eastern concern, Straus & Company, to loan $810,000 upon the property upon a building mortgage, but the terms of the contract proposed by Straus were such that the offer was rejected, (Tr. p. 1041) and an application had been made to the Metropolitan Life Insurance Company, which had agreed to lend $600,000.00 upon the proposed building when the same was completed. (Ex. 177, Tr. p. 981 et seq.). Simpson had represented to the Company that he could arrange to obtain the funds for temporary use, if the proposed Metro-

politan Mortgage were made to run to him, and in accordance with that representation the Metropolitan had agreed to take an assignment of the mortgage instead of requiring that it run directly to it, (Ex. 222, Tr. p. 1093). In its agreement, however, the Insurance Company had provided that the mortgage had to be placed of record before any work should be done on the new building, and that the contracts with the contractors furnishing labor and material for the building should have clauses subordinating their right to liens to the lien of the mortgage. (Ex. 177, Ab. p. 984.)

The Building Company had employed Mr. Frederick Webber of Philadelphia, as architect, and he had prepared plans which had been submitted to the Metropolitan.

Simpson and Webber represented that they had placed the second mortgage bond issue, and that as soon as it was executed and delivered the $750,000.00 would be forthcoming, leaving for the Building Company after its payment to the Bank, $400,000.00 in cash for immediate use. (Tr. p. 1018.)

Besides this, the Scandinavian-American Bank of Seattle had agreed to take $150,000.00 of these second mortgage bonds, in case of necessity.

The Building Company was incorporated for $200,000.00, practically all of which was subscribed for by O. S. Larson, the President of the Scandinavian-American Bank of Tacoma, who represented that he had arranged to get the money for the stock. (Tr. p. 1169.)

So that there was apparently available for the building ample funds, since the building was to cost less than $1,100,000.00.

After acquiring title to this property the Building Company entered into the contracts with the lien claimants in this action, as contractors, who state that they were told by Mr. Drury, the President of the Company, of this proposed $600,000.00 mortgage, and of the requirement that the right to liens had to be waived. Also that there would be $400,000.00 in cash available for construction purposes pending the completion of the building, when the $600,000.00 would be payable by the Metropolitan Insurance Company.

The contract entered into between the McClintic-Marshall Company and the Scandinavian-American Building Company was on the "standard form" prepared and used by the McClintic Company, and contains the following clauses (Exhibit "A", Tr. p. 40):

> "ARTICLE I. The Contractor agrees to furnish and deliver F. O. B. cars, their works, present rate of freight allowed to Tacoma, Washington, * * * the structural steelwork for the Scandinavian-American Bank Building * * * in accordance with the plans covering steel and iron work as prepared by Frederick Webber.
>
> "ARTICLE II. The Contractor agrees to begin shipment of the material within 60 days and to make complete shipment of material within 120 days after the date of this agree-

ment * * *

"ARTICLE X. It is also agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this agreement and the third by the two thus chosen, * * *. The decision of any two of these shall be final and binding * * *

"IN WITNESS WHEREOF, the parties hereto have executed this agreement at Pittsburgh, Pa."

Out of approximately four and a half million pounds of steel contracted to be furnished by the McClintic-Marshall Company before June 6, 1920, it had shipped only about 150,000 pounds, or 2½% up to August, 1920, (Tr. pp. 657-8) and as a result of this breach of the contract, the Building Company was during that time claiming a loss of $5,000.00 per month, and the Building Company in September, refused to make any further payments for steel.

Under date of September 30th, Larson wired Sheldon: "Withhold payment steel invoices" (Ex. 343 p. 1225-6), and under date of October 7, 1920, he wired Sheldon: "Do nothing McClintic-Marshall until last car received," and in fact did not pay the McClintic-Marshall anything for its shipments made during August, September, October and November, being practically all of the steel, although at that time it was paying the other con-

tractors in accordance with the terms of their contracts.

The Federal jurisdiction of this suit depends upon the McClintic-Marshall claim, that being the only lien asserted by a non-resident, greater than $3,000.

Our objection to the jurisdiction of the Court to try the case on account of the refusal of the McClintic-Marshall Company to arbitrate and on account of the receivership was interposed before any evidence was taken upon any claim, and the letters showing the existence of this controversy are as follows:

At the beginning of the case, and before the introduction of any evidence therein, the following occurred:

MR. OAKLEY (Tr. pp. 656-657):

Before the first lien claim is started to be proved the Receiver wishes to make this objection to the introduction of any testimony that has to do with the lien foreclosure suit. We object for the reason that the property of the Scandinavian-American Building Company is now in the hands of this Court through the appointment of a Receiver, and a lien foreclosure suit cannot be maintained looking toward the sale of the premises while the Court itself is administering the estate that has been held in the State of Washington and held in the United States Supreme Court as late as 241 U. S. page 587, in *Bacon vs. Standard*, 60 Law. Ed. 1191 * * * I want to show that the point has been

raised properly before the Court and I am objecting to the proof of contractors and anything looking to the foreclosure of the liens.

THE COURT: It will be so considered.

Prior to the introduction of any testimony on behalf of the complainants, McClintic-Marshall Company, the following occurred:

MR. OAKLEY: * * * The Receiver objects to the introduction of any testimony on the McClintic-Marshall claim for the reason that the contract provides that any controversies arising out of the contract should be submitted to arbitration, which was not done, and therefore bars the action. This was passed upon by the Court and I now renew the objection.

THE COURT: The objection overruled, exception allowed.

Exhibit No. 7

Letter from Larson to McClintic-Marshall Company, dated June 16, 1920:

> "This morning we received the following telegram: Have shipped only girders to date. Traffic conditions and shortage of cars have forced mills to practically suspend rolling mill for past two weeks. The outlook more promising at present time. Hope to receive material for lower floors your building about July 1st and to make shipments in July. Shipment of entire building by first of September. It is impossible to make definite promise until mills resume operations."

In our former letter to you we pointed out that our steel contract was awarded to your company under representations that the necessary steel for the entire building was to be taken out of the stock in five different yards, as we remember it, and when I was in the East the last time, being with your Philadelphia representative about April 5th, I was assured that the first shipment of steel would go forward not later than the 10th of April. Now it turns out that the rolling material has to be secured from the mills and that the steel was not in stock at all. I wish to point out again that we have been ready to erect this steel for the past six weeks and that the delay is costing us $5,000 per month in interest and carrying charges on the building. (Tr. p. 658.)

Defendant's Exhibit No. 8 (Tr. p. 972)

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, June 14, 1920.

Mr. C. D. Marshall,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Sir:

Enclosed herewith please find confirmation of night letter sent you to-day, and while we have no doubt that you have done everything possible about the movement of this steel, we wish, nevertheless, to point out that the foundations for this building have been completed for practically a month even though we have been delaying the work on account of the nonarrival of the steel, and that now the

investment in the foundation and the real estate on which it stands is costing us approximately $5,000.00 per month during the time that the building is being delayed.

Defendant's Exhibit No. 9 (Tr. p. 973)

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, June 23, 1920.

PERSONAL.

C. D. Marshall, President,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Mr. Marshall:

I wish to acknowledge receipt of the following telegraph from you received this morning:

* * * * * * * * * *

At the same time, we wish to announce that the first shipment of steel, being the car of grillage, arrived in the yards in Tacoma this morning and will be unloaded this afternoon.

I have already pointed out to you the necessity for quick action in moving this steel on account of the fact that a public institution is involved in the construction of this building, and that as far as possible, a bank should avoid public criticism, even that of being criticized for being slow in the construction of a bank building. May we not have the assurance from you that this contract of ours will have the right of way from now on?

Defendant's Exhibit No. 10 (Tr. p. 974)

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, June 29, 1920.

H. H. McClintic, Vice-President,
McClintic-Marshall Company,
Pittsburg, Pa.

Dear Mr. McClintic:

This is to acknowledge receipt of your letter of June 24th.

* * * * * * * * * *

We are very much surprised to learn that the contract you have for furnishing steel for the Telephone Building at Seattle was let two months later than the contract for our bank building, and you have to date delivered considerable more steel to the Seattle Telephone Building than you have delivered to this bank building. I do not want to be bothering you by continually writing to your company about this matter, but I do hope that you will bend every effort to get this steel delivered as quickly as possible. You have got to realize that in this matter you are dealing with a banking institution which should at all times, as far as possible, avoid any public criticism, even on such a matter as this. Upon receipt of this letter, I would like to have you write me fully as to the progress of this steel order and when we may expect to get some more cars on the way out here.

Defendant's Exhibit No. 11 (Tr. p. 975)

SCANDINAVIAN-AMERICAN BANK

Tacoma, Washington, July 6, 1920.

SPECIAL DELIVERY.

C. D. Marshall, President, or
H. H. McClintic, Vice-President,
McClintic-Marshall Company,
Pittsburg, Pa.

Gentlemen:

Referring to my former letters to you, I beg to enclose herewith a picture taken July 2d, during the noon-hour, of the two corners at 11th Street and Pacific Avenue, in Tacoma, showing in the extreme background, the Bank of California Building, next to it, the W. R. Rust Building under construction and in the foreground the foundations and the grillage just received for the new Scandinavian-American Bank Building. Construction on the Rust Building was started several weeks after the placing of foundations of the Scandinavian-American Bank Building had begun. Mr. Rust purchased his steel in Minneapolis, and we understand that the entire delivery will be effected on July 20th. This picture brings forcibly before us the actual situation regarding the construction of our building.

I hope that you gentlemen, Mr. Webber and Mr. E. E. Davis, the steel erector, who has just left here, will find some way to get our steel here at once.

Exhibit No. 12 (Tr. p. 976)

Letter from Larson to H. H. McClintic, dated July 20th, 1920:

> "We have previously pointed out to you that the steel order was awarded to your company from among several competitors on representation of your Philadelphia representatives that most of this steel would be taken out of stock in five different yards. It now turns out that you did not have the steel at all at the time this representation was made. * * * If this material can be had in the country, it seems to me that it is up to your people to buy it wherever you can get it and get it out here immediately in order to save us the added carrying charges which are accruing every day."

Defendant's Exhibit No. 14 (Tr. p. 977)

SCANDINAVIAN-AMERICAN BANK

August 6, 1920.

McClintic-Marshall Company,
Pittsburg, Penn.

Gentlemen:

Referring to your contract of February 5, 1920, for the furnishing of steel for the Scandinavian-American Bank Building, you, of course, are advised that there will be a substantial increase in freight rates beginning on September 1, 1920. Under your contract with us you agreed "to furnish and deliver f. o. b. cars there works, present rates

of freight allowed Tacoma, Washington."

Under these circumstances we deem it proper to advise you that it is imperative that the shipments be made before September 1st.

Owing to the delays already occasioned, through no fault of ours, we are daily sustaining heavy losses; hence we urge prompt shipment of our material.

Very truly yours,
SCANDINAVIAN-AMERICAN BUILDING CO.
By CHARLES DRURY,
President.

Exhibit No. 104

Letter from McClintic-Marshal Company to O. S. Larson, dated June 24, 1920.

"Our proposition for this work contemplated taking considerable material from stock and we have done so wherever possible."

Exhibit No. 117

Frederick Webber to McClintic-Marshall Company. Letter dated May 1, 1920.

"You seem to be laboring under a wrong impression in regard to our steel work of the Scandinavian-American Building, Tacoma, Washington, and I am astonished to find such an excuse this morning, that you are waiting for the steel for your grillage and Mr. Chudduck informed me before he left that this was all in the shop. Our arrangement with Mr. Chudduck was as per our

specifications, that four stories of the material was to be bought in the open market for immediate delivery. And he informed me that McClintic-Marshall was the only concern in the Country who had the length and size of plates for the girders. We made substitutions to conform with the material you had on hand, and you entered into a contract with me under these conditions and according to the specifications.

"We changed our plans to suit the material that you had in stock and he informed me before he went away that as far as grillage was concerned, it was all in the shop and they were working on it, and now I understand from you that you are waiting for it from the mills. The Scandinavian-American Bank people were willing to pay you an extra price which was considerably more than anybody else figured in order to take the material from your stock which Mr. Chudduck informed me he had on hand.

"A long time ago your Mr. Burpee informed us a lot of the material had already been cut from material that was already in stock. You are certainly laboring under a wrong impression as your steel for the grillage should have been shipped according to our contract long before the railroad strike occurred. I trust I shall get a very different report from you by return."

Exhibit No. 118

Letter from Frederick Webber to McClintic-Marshall Company dated May 7, 1920.

"I dont' seem to be able to get any satisfaction to my inquiries with regard to the steel work for the above building. It was thoroughly understood between your Mr. Chudduck and myself that the steel work was to either be bought in the open market, as per our specifications, or to be taken from stock. After making inquiries Mr. Chudduck informed me that he was able to get the material for the first four floors as per the requirements of the specification. He also informed me before taking the contract that he had been able to obtain the plates for the large girder over the banking rooms. The other work he desired to alter to suit such material as you had on hand, which he informed me was about 30,000 tons. Our steel plans and layout has been changed to suit this condition, and I cannot understand why I cannot get more definite information in regard to this work. I am trying to find out how much of this has been fabricated. According to the contract, the grillage has to be shipped within two months from the 5th of February. Various changes were made in the grillage to suit the material you had on hand. Mr. Kennedy now informs me that you are waiting to have these beams rolled at the mill which is so foreign to my understanding, specifications and contract.

"It seems to me that it will be necessary to keep a man to look after this work in Pittsburg as at

the present time the letters I have been writing do not seem to bring any results. If it is necessary I will come to Pittsburg and go over this matter with you as it appears to me that you have not the right impression of this contract."

Exhibit No. 122

Letter from Frederick Webber to McClintic-Marshall Company dated June 12, 1920.

"Your letter of June 10th received and contents noted. I am very much surprised to get your report. It is past my comprehension how you could have taken a contract and undertook terms as are specified in our specifications and carried forward in your contract, and now, after four months, which is the expiration of your contract, to send me such a report as you do. Of course, it is quite evident that you did not have the material for the four floors in stock as Mr. Chadduck stated that you had, therefore you are not adhering to the specifications and contract. If you had four stories as per the contract, it would be possible for us to make a very good beginning, even if there was quite a delay on the other work.

"In your report you do not say the condition of the work for the big girders and columns for the banking floor, what condition they are in or how much work is being fabricated of same. The building committee has sent for me to come out there as they cannot understand why they are paying the highest price for the material and not receiving same, and it was thoroughly understood

that they should. You are putting me to the trouble of going there to explain why you have not lived up to your contract. According to your reports after four months not more than fifty per cent has even been rolled yet. This does not trouble me so much as the point that the four stories were to be taken from stock or bought in the open market and considering that the building company are paying you $18,000 more than the contractors who figured on this work, but stated that they could not have the material in stock and would have to wait until it was rolled. As I state, I must ask you for a more definite report on the work done on these first four floors."

Exhibit No. 125

This is a statement showing the amount paid for extra work by the building company for correction of certain items and mistakes in the steel frame work furnished by the complainant, aggregating $3,000.

The Building Company also claimed that by reason of the increase of freight rates after the date upon which all of the steel should have been shipped under the terms of the contract, it lost $14,052.76 (Tr. p. 665) and that by reason of the faulty construction of steel shipped by the McClintic-Marshall Company, it was damaged in the sum of approximately $3,000.00, and the McClintic-Marshall Company admitted that of this amount, $1100.00 should be charged to them on that account. (Tr. p. 664).

As we have said, the contractors with the exception of a few signed contracts which by their terms expressly waived the right to lien. These clauses were the same in each instance, and are as follows:

ART. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim for lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

The Receiver in his answer to the McClintic-Marshall petition alleged that by reason of the failure of the complainant to ship the steel in accordance with the terms of the contract, the building company had suffered a loss of $50,000.00 and that repeated demands had been made upon complainant to arbitrate the losses sustained thereby, which demands had been ignored (Tr. pp. 58-64) which portion of the answer was, by the Court, stricken therefrom. (Tr. pp. 66-68).

The Court in his Decree held that the waivers were induced by fraud and that by reason thereof "*the waivers are decreed to be of no force and effect*" (Tr. p. 521, Paragraph XXXIII.) and allowed the contractors liens *for the contract price and upon the contracts.* Thus setting aside *one clause* of the contracts on account of fraud, but enforcing the balance of the same contracts. One of the claimants, however, the E. E. Davis & Company, was consistent enough to offer to rescind the

contract, but nevertheless directed all of its evidence to the contract price.

The Receiver filed the following:

Assignments of Error (Tr. p. 547)

I.

The court erred in holding that the McClintic-Marshall Company, a corporation, complainant herein, has a valid and subsisting materialmen's lien upon the real estate, premises, or any part thereof described in paragraph three of said Decree, for the reason that the arbitration agreement contained in the contract between the complainant and the Scandinavian-American Building Company was not complied with by the complainant and its failure and refusal to arbitrate matters in dispute under the contract constituted a bar to the prosecution of this action to maintain and foreclose a lien claim.

II.

The court erred in not holding that because of the arbitration agreement contained in the contract between McClintic-Marshall Company, and Scandinavian-American Building Company, that the complainant had waived its right of lien under the Statutes of the State of Washington, in such cases made and provided, until and unless it had substantially complied with the arbitration agreement which was a binding and valid agreement under both the laws of the State of Washington, and of the State of Pennsylvania, the domicile of complainant corporation.

III.

The court erred in refusing to hold that because of the arbitration agreement referred to in the two preceding assignments of error the court is without jurisdiction to hear and determine the merits of said claim and for that reason had no jurisdiction to hear and determine the subject matters involved in this litigation, and has no jurisdiction of the parties.

IV.

The court erred in permitting the introduction of testimony in proof of the complainant's complaint and lien claim for the reason that the contract between complainant and the Scandinavian-American Building Company upon which complainant bases its right of recovery, provides that any controversies arising out of the contract should be submitted to arbitration, which was not done and said failure and refusal so to do constitutes a bar to the prosecution of said lien claim.

V.

The court erred in not dismissing the Bill of Complaint.

VI.

The court erred in holding that the Puget Sound Iron and Steel Works, a corporation, has a valid lien as provided in paragraph ten of said decree, for the reason that the said corporation never filed any complaint or cross complaint, or other pleadings in this action, seeking a foreclosure of its alleged lien, and under the laws of the State

of Washington, such action must be instituted within eight months from the filing of its said lien claim.

VII.

The court erred in decreeing a foreclosure of liens in this action because that when the court appointed a receiver for the Scandinavian-American Building Company in the above entitled action, the court deprived itself of the power to foreclose the lien claim and had only the power and right to allow or reject claims in the receivership proceeding and to determine the rank and priority of each claim allowed.

VIII.

The court erred in holding lien claimants entitled to interest and attorney's fees for the reason set forth in Assignment of Error No. VII and for the further reason that in a receivership proceeding interest and attorney's fees are not allowable as attempted to be allowed in the decree entered herein.

IX.

The court erred in holding in paragraph XXXIII of the decree entered herein that the Tacoma Millwork Supply Company, E. E. Davis & Company, Edward Miller Cornice & Roofing Company, Otis Elevator Company, H. C. Greene, Washington Brick Lime & Sewer Pipe Company, Ben Olson & Company, were induced to enter into their contracts containing waivers of lien by reason of false and fraudulent representations made on behalf of the

Scandinavian-American Building Company, and in decreeing that by reason thereof that the said waivers be of no force and effect and in allowing any of said claimants in this paragraph XXXIII mentioned, or Crane Company, a lien claim or claims, in this action, for the reason that the said lien waiver clauses are valid and binding obligations.

Argument

I.

The Receiver contends:

1. That the arbritration clause continued in the McClintic-Marshall contract, bars this action.

2. The lien waiver clauses are valid obligations.

3. The appointment of the Receiver bars the action as a lien foreclosure.

Upon our first contention the evidence presents a most interesting and enlightening situation. The McClintic-Marshall Company, a Pennsylvania Corporation, as vendor, makes a contract with the Scandinavian-American Building Company, a Washington corporation, as vendee, whereby it agrees to "furnish and deliver F. O. B. cars", its works, the steel for a large building before June 6, 1920, "present rate of freight allowed" "in accordance with plans." It fails to "furnish or deliver" the steel before September when the freight rate is raised, and it fails to furnish the steel "in accordance with plans." The vendee does not de-

clare the contract at an end because of these breaches but accepts the faulty steel when shipped in September, October and November and pays the increased freight rate. The contract provides for the submission to arbitration of disputes arising thereunder, and while the contract is still executory the vendee demands an arbitration of these disputes. The vendor refuses to arbitrate, ships the steel and files a mechanics lien, a right created by the Washington Statutory Law. Under the common law of Washington the vendor could not foreclose under these circumstances, so it seeks the aid of the Federal Court sitting in Equity, claiming that the Federal Court is not bound by the Law of Washington where the res is situated, or the Law of Pennsylvania, the State where the contract was made and fully performed, admitting that it would have no standing in the State Court of either Washington or Pennsylvania, thus seeking the aid of the Federal Court of Equity to enable it to circumvent the laws of its own domicile and the laws of the State of Washington.

It is our contention that this is equivalent to asking a Court of Equity to assist it in the commission of a fraud.

We believe that the Court should have given effect to this arbitration clause and to its breach by the complainant,

1st. Because under the common law of Washington these facts would preclude the maintenance of this action, and the action is, by its nature, local.

2nd. Because this clause does not oust the Court of jurisdiction and is therefore valid under all decisions since its application was to facts and disputes arising during the progress of the completion of the contract, and does not oust the Courts of jurisdiction to foreclose the lien after the controversies arising under the contract have been determined by the arbitrators.

3rd. Because a court of equity will not lend its aid to a contract breaker.

4th. Because the public policy of the United States with respect to these arbitration clauses has changed if we assume that the policy was over against arbritration.

5th. This contract was made in Pennsylvania to be entirely performed in Pennsylvania, and it would certainly seem to us that the law of Pennsylvania which holds such a clause valid should have some controlling force. The contract right to arbitrate should not be lightly taken away upon the theory that it provides a remedy merely and is inconsequential.

1. We contend, first, that because of the arbitration clause contained in the contract made between the parties, that the McClintic-Marshall Company has no lien which can be enforced by this Court.

This is a plea to enforce materialman's liens, as distinguished from an action to recover judgments for debts. The materialman's lien does not exist at common law. It is a pure creature of statute. The action to foreclose such a lien is an action in rem entirely dependent upon the State statutes which create the right and provide the remedy. It must, therefore, be regarded as a statute which creates rights in real property and affects the title to real property, particularly since it deals entirely with real property.

The general rule is that on all questions which relate to the rights in or title to real property, the Federal Court must follow the decisions of the Supreme Court of the State, under the "Full faith and credit clause" of the United States constitution, as is illustrated by the case of *Hartford Fire Insurance Company vs. Milwaukee & St. P. Ry. Co.*, 175 U. S., 91, in which the Supreme Court holds that the validity as affected by public policy, of a stipulation in a lease exempting a railroad company from liability for negligence for setting fire to a storage warehouse on the railroad right-of-way, was a question upon which the decisions of the State Court were binding upon the Federal Court.

Rights and titles to things which have a per-

manent locality such as the rights and titles to real estate are governed by the decisions of the State Supreme Court, even though such questions may arise in the Federal Court.

Swift vs. Tyson, 16 Pet. 1, 10 L. Ed. 800.

This rule has been steadily adhered to in the Federal Court and finds expression by Justice Harlan in the case of *Guhn vs. Fairmount Coal Co.*, 215 U. S. 349; 54 L. Ed. 228, where he says that the Federal Court is bound by the decisions of the State Supreme Court, where, before the rights of the parties accrued, certain rules relating to real estate have been so established by State decisions as to become rules of property.

The written contract which is the basis of the McClintic-Marshall Company's rights, insofar as its rights attach to the real property described in the complaint must therefore be construed with reference to the common law of the State of Washington.

While the Federal Courts, when construing commercial contracts which have no refrence to real property, in actions for the mere recovery of a debt, are free to decide the question of construction independently of any decisions of the State Supreme Court, yet, when the contract becomes the basis for a right in real property, and that right is being asserted in an action based upon a local statute which creates the right, the question must necessarily become a local one, and the Federal Court must follow the decisions of the Supreme

Court of the State in which the real property is located.

Thus where it appears that the State Supreme Court has construed certain language found in a deed, will, or other monument of title, and has held that this language grants an estate or confers rights in real property, the Federal Courts must give the same effect to the language.

Buford vs. Kerr, 90 Fed. 518.

The decisions of the State Supreme Court are binding upon the Federal Court upon the question whether a deed reserving a vendor's lien vested title in the grantee.

Oliver vs. Clarke, 106 Fed. 402.

Also whether the granting clause of a deed will prevail in case of a conflict with the other parts of the deed.

Dickson vs. Wildman, 183 Fed. 398.

So the settled law of a State on the subject of mortgages has been held to be a rule of property which is binding upon the Federal Court.

Haggart vs. Willczinski, 143 Fed. 22.

Also the nature and extent of the mortgagees rights.

Omaha vs. Omaha Water Company, 192 Fed. 246.

So, also, all questions relating to chattel mortgages are generally held to be local questions upon which the Federal Court are bound by the decisions of the State Supreme Court.

Humphrey vs. Tatman, 198 U. S., 91;

Thompson vs. Fairbanks, 196, U. S. 516.

State decisions establishing the rule that a vendor's lien does not pass under an assignment of the debt secured, must be followed as a rule of property by the Federal Court.

Over vs. Gallegher, 193 U. S. 199.

We have found only two decisions in the United States Supreme Court dealing with statutory mechanic's or materialman's liens. The first is the case of *Van Stone vs. Stillwell*, 142 U. S. 128. In that case the question was as to certain rights established by the lien statute of the State of Missouri, and, although the Supreme Court of the United States did not say so in words, yet it is significant that in deciding the questions at issue, the Supreme Court referred only to Missouri cases.

This precise question, however, was decided by the United States Supreme Court in the case of *Knapp, Stout & Co. vs. McCaffrey*, 20 Sup. Ct. R. 824, 177 U. S. 638. In that case the plaintiff had made a contract to tow certain logs. It was not paid the contract price, and brought an action in the State Court of Illinois asserting a possessory lien upon a half of a raft of logs which it had in its possession, for the whole debt due it under its contract. The defendant raised the question as to the plaintiff's *right to a possessory lien* upon the part of the logs under the laws of the State of Illinois, *the extent of the lien*, and also the question as to whether or not the plaintiff under the facts of that case, did have the *possession* of the

logs, and also contended that the plaintiff had only a maritime lien, enforceable only in the Federal Court. The case was decided by the Court of Illinois in favor of the plaintiff, and the defendant appealed to the Supreme Court of the United States, which decided that the lien was not a maritime lien, and the decision then reads:

"In the case under consideration the remedy chosen by the plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are paid, is too clear for argument. We know of no reason why this principle is not applicable to property towed as well as to property carried. While the duties of a tug to its tow are not the duties of a common carrier, it would seem that his remedy for his charges is the same, provided that the property towed be of a nature admitting of the retention of possession by the owner of the tug. But whatever might be our own opinion upon this subject the Supreme Court of Illinois, having held that under the laws of that state the plaintiff had a possessory lien upon this raft, that such lien extended to so much of the raft as was retained in his possession, for the entire bill, and that under the facts of this case plaintiff did have possession of the half raft until he surrendered it under the order of the court for its release upon bond given, we should defer to the opinion of that court in these particulars as they are local questions dependent

upon the law of the particular state."

In the case of *Fidelity Ins. & Safe-Deposit Co. vs. Shenandoah Iron Co.*, 42 Fed. Rep. 378, the Court says:

"It is a well-settled principle that the decisions of the highest state courts, in the construction of the state constitution and laws, are to be adopted by the federal courts. This doctrine is established by numerous decisions. Spear, Fed. Jd. 645, 646; *Shelley vs. Guy*, 11 Wheat. 361; *Jackson vs. Chew*, 12 Wheat, 153; *Green vs. Neal's Lesses*, 6 Pet. 291; *City of Richmond vs. Smith*, 15 Wall. 429. The decision of the court of appeals of Virginia in the case cited controls in this cause. The reasons assigned in that case for holding the acts unconstitutional as to supply claims against a railway company apply with equal force to supplies furnished a mining or manufacturing company; and the court decides that the material and supply claims existing prior to the appointment of the receivers have no priority over the lien of the mortgage bonds."

In the case of *Griseler, et al.*, 136 Fed. Rep. 754, the Court says:

"The trustee, in making the application, seems to have acted upon the theory that he obtained a priority over the Van Kannel Revolving Door Company because the latter's notice of lien was not filed until after the filing of the petition for adjudication of bankruptcy. The decision of this court in *Re Roeber*, 9 Am. Bankr. Rep. 303, 121

Fed. 449, 57 C. C. A. 565, that a trustee in bankruptcy of a contractor was entitled to priority over a materialman who had not filed his notice of lien until after the institution of the bankruptcy proceeding, was based upon the consideration that the trustee succeeded to the same title which would have vested in an assignee of the contractor for the benefit of creditors, and adopted the construction of the mechanic's lien law (Laws 1897, p. 514, C. 418) which at that time was supposed to prevail in the courts of New York. It had been held by the state courts that the statute did not preclude the contractor from paying his creditors out of the moneys due or to become due to him from the owner, to the exclusion of the materialmen who had not filed liens, and that, until the materialman had filed his notice of lien, he was merely a creditor at large of the contractor. *McCorkle vs. Hermann*, 117 N. Y. 297, 22 N .E. 948; *Mack vs. Colleran*, 136 N. Y. 617, 32 N. E. 604; *Stevens vs. Ogden*, 130 N. Y. 182, 29 N. E. 229. Some of the state courts had also held that, the materialman being merely a creditor at large until the filing of his notice of lien, he could not obtain priority over a general assignee of the contractor for the benefit of creditors by filing the notice subsequent to the making of the general assignment. This court, in Re Roeber, approved the reasoning of these decisions, and, following their construction of the statute, held that the materialman who had not filed his notice of lien could not acquire priority

over a trustee in bankruptcy of the contractor by filing his notice subsequent to the time when the title of the trustee accrued. Since that decision, however, the New York Court of Appeals, in *John P. Kane Company vs. Kinney*, 174 N .Y. 69, 66 N. E. 619, has overruled the decisions of the state courts which were followed by this court; and, as this is a decision in the construction of a state statute by the highest court of the state, this court should follow it."

In the case of *The Winnebago*, 114 Fed. Rep. 945, the syllabus says:

"The Michigan Water craft act (Comp. Laws, p. 298), which gives a lien to the contractors and persons furnishing labor and materials in the construction of vessels, relates to contracts which are not maritime, and its construction by the Supreme Court of the state in binding on the federal courts."

In the case of *Morgan vs. First National Bank of Mannington, et al*, 145 Fed. Rep. 466, the Court says:

"Regarding the claim of the Pittsburg Gage & Supply Co. for $2,193.15, the mechanic's lien in that case does not appear to conform to the laws of the state of West Virginia as construed by the Supreme Court of Appeals of that state, by which decision we feel bound in determining upon the validity of the statutory lien enforceable in bankruptcy. The precise question raised as to this lien —namely, whether the affidavit supporting this lien, taken before a notary public in the State of

Pennsylvania, was properly authenticated—was decided in the case of *Lockhead vs. Berkley Springs W. & I. Co.*, 40 W. Va. 553, 21 S. E. 1031, and such an authentication as we have in this case was therein declared to be insufficient under the laws of West Virginia, and the mechanic's lien declared on that account invalid. The claim of the Pittsburg Gage & Supply Company will therefore be treated only as an unsecured claim in the future conduct of this case."

In the case of *George A. Shaw & Co. vs. Cleveland, C. C. & St. L. Ry. Co.*, 173 Fed. Rep. 746, the syllabus says:

"The construction of a state Constitution or statute by the highest court of the state is binding upon the federal courts in cases involving rights which arose after such construction was given."

In the same case the brief says:

"But it is said that this court, in *Jones vs. Great Southern Fireproof Hotel Company*, 86 Fed. 370, 30 C. C. A., 108, held that section 3184, Revised Statutes of Ohio, as amended by the act of April 13, 1894, was not unconstitutional under the Constitution of Ohio, but was valid and enforceable, and that in that view we were affirmed by the Supreme Court in *Great Southern Fireproof Hotel Company vs. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778. The lien asserted in *Jones vs. Great Southern Hotel Company*, and enforced by this court, arose before the Ohio court had decided *Palmer vs. Tingle*, and before the Ohio court had

decided any case affecting the constitutionality of any act creating a lien in favor of persons having no direct contract with the owner. We were, therefore, not only at liberty, but under obligation to exercise an independent judgment in respect to the validity of the statute in question. The lien now asserted arose long after the decision in *Palmer vs. Tingle*, and, if that decision is to be regarded as a construction and application of the organic law of Ohio, it is obviously our duty to accept that construction and apply it to the case now under consideration, inasmuch as we are not now dealing with rights which arose before that decision, but with rights under contracts made long since that construction."

The McClintic-Marshall Company was seeking to invoke the jurisdiction of the Federal Court to give it a right which it did not have by virtue of either the common law or the Statutary law of the United States, but which it had, if it had any right at all, under the statutory law of the State of Washington. Under these circumstances, it seems to us, that the complainant could not ask the Court to give it a right *created* by the Washington statute, and at the same time to ask this Court to ignore the Washington Common law, which doubtless was considered by the Washington Legislature when it created that right, and which adds a condition precedent to the enforcement of that right.

The Washington statute, giving a materialman a lien must be construed by this Court in the light

of the Washington common law. Any act of legislation must be read in the light of the common law.

"That * * * is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law."

Sthick vs. United States, 24 Sup. Court Reporter, 826, 195 U. S. 65.

We think there can be no serious contention but that the complaint of the McClintic-Marshall Company would have been dismissed upon demurrer in the State Court of either Washington or Pennsylvania. The Supreme Court of the State of Washington, in the case of *Herring Safe Company vs. Purcell Safe Company*, 81 Wash. 592 at page 595, says:

"You have held in a long line of cases that where parties enter into a contract and provide therein that all differences between them that may thereafter arise out of the contract shall be submitted to a board of arbitrators whose decisions thereon shall be conclusive and final upon the parties, no action can be maintained on the contract by either party until he has tendered arbitration of the difference to the other party, and such other party has refused the tender." (Citing many cases.)

The arbitration clause in the contract would be a condition precedent to the assertion of its lien right in Washington on the part of the complain-

ant. Even if we were to concede that if the McClintic-Marshall Company had brought this suit in the Federal Court upon this contract, seeking merely to recover a judgment for money, the Federal Court would not be bound by the decisions of the Washington Court with reference to this arbitration clause, nevertheless, when the complainant bases its right to a lien upon the specific real property in Washington upon this contract, then the whole question becomes a question as to the rights in real property, a local question, and the Federal Court is bound by the decision of the Washington Supreme Court.

The plea, therefore, which set up this arbitration clause was at least a defense to this action.

2nd. We further contend that the clause in the contract in question herein is a condition precedent to the bringing of any suit upon the contract even under the Federal decisions.

This arbitration clause must be read by the Court in the light of the balance of the contract and with reference to the well-known rules of construction which require the Court to give to a contract a construction which renders it valid rather than one which renders it invalid.

This contract, as a whole, shows that the complainant, McClintic-Marshall Company, agreed to furnish to the Scandinavian-American Building Company the structural steel work for the building and to begin shipment within sixty days, and to make complete shipment within 120 days after

the date of the agreement, and provided that the building company should pay the complainant 85% of the full value of the shipment on the 20th day of each month, following the day of shipment, remaining 15% thirty days thereafter, and paragraph XV of the bill shows that the cross-complainant actually did send this steel forward in several shipments covering a period of four months. If this arbitration clause be construed to mean that controversies arising between the parties *while the contract was in existence* and was in process of being completed and while both parties to it were keeping it alive, should be submitted to arbitration, no court is or has been thereby ousted of any jurisdiction. Matters of dispute arising between the parties under these circumstances could not be litigated in any Court. This is substantially what the evidence and answer shows did happen. While both of the parties to this contract were keeping it in force, although it is probable that both of the parties may have considered that the other party had so breached the contract that it would be entitled to declare it terminated, yet neither party did, in fact, declare the contract terminated, but kept it alive, and while affairs were in this status, the evidence shows and the answer alleged that the building company repeatedly demanded that the complainant submit the matters of dispute between the parties to arbitration in accordance with the provisions of the contract, which said demands the complainant refused

to comply with. This provision was not, therefore, independent of the other provisions of the contract, but was an integral part of the contract as a whole, and compliance therewith is a condition precedent to any action in the Federal Court as well as in the State Court of Washington.

In the case of *Memphis Trust Company vs. Brown-Ketchum Fire Works*, 166 Fed. 398, the Circuit Court of appeals uses the following language with reference to an arbitration clause worded as follows:

"Or in any other case or contingency whatsoever in which a dispute should arise in regard to the conditions or proper interpretation."

"It is, however, now too well settled to admit of controversy that provisions in a building contract such as exist here, by which a given architect is expressly clothed with the broad authority to determine finally all matters in dispute under the contract, and by which final settlement is to be had and payments made upon architects certificates do not create a mere naked agreement to submit differences to arbitration. Nor are such provisions for arbitration merely collateral to and independent of the other provisions of the contract; but they are, on the other hand, of its very essence, and such agreement is not subject to revocation by either party, but actual or tendered compliance with the terms of the contract is a necessary condition precedent to recovery upon it; and an award made by virtue of such contract provision, in the

absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties thereto, so far as it is confined to disputes actually subsisting and open to arbitration. The following are illustrative of the long line of authorities which announce and enforce the proposition just stated: *Kihlberg vs. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Sweeney vs. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; *Martinsburg & Patomac R. R. Co. vs. March*, 114 U. S. 549, 5 Sup. Ct. 1035; 29 L. Ed. 255; *Chicago, S. S. & C. R. R. Co. vs. Price*, 138 U. S. 185, 192, 11 Sup. Ct. 290, 34 L. Ed. 917; *Sheffield etc., Ry. Co. vs. Gordon*, 151 U. S. 285, 298, 14 Sup. Ct. 343, 38 L. Ed. 164; *U. S. vs. Gleason*, 175 U. S. 588, 602, 80 Sup. Ct. 228, 47 L. Ed. 284; *Am. Bonding Co. vs. Gibson County*, 127 Fed. 671, 62 C. C. A. 397; *Pauly Jail Building, etc., Co. vs. Hemphill County*, 62 Fed., 698, 704, 10 C. C. A. 595; *Mundy vs. Louisville & N. Ry. Co.*, 67 Fed. 633, 67, 14 C. C. A. 583; *Elliot vs. Missouri, K. & T. Ry. Co.*, 74 Fed. 707, 709, 21 C. C. A. 3; *Boyce vs. U. S. Fid. & Guar. Co.*, 111 Fed. 138, 142, 49 C. C. A., 276; *No. Am. Ry. Cons. Co. vs. McMath Surveying Co.*, 116 Fed. 169, 174, 54 C. C. A., 27; *C. & N. Ry. Co. vs. Newton*, 140 Fed. 225, 71, C. C. A. 655; *Railroad Co. vs. Cent. Lbr. Co.*, 95 Tenn. 538, 32 S. W. 635; *St. Paul & M. P. Ry. Co. vs. Bradbury*, 42 Minn. 222, 227, 44 N. W. 1."

This case is on all fours with the case at bar.

The covenant to arbitrate is practically the same in the contract under consideration there as it is in this case. Although the contractor agreed to submit the matter to arbitration, he did not do so, but breached the agreement, and refused to submit to arbitration.

There should be a distinction between agreements to arbitrate contained in contracts which have become executed before the arbitration clause becomes operative, such as insurance contracts, and contracts such as the one in question, where the arbitration clause becomes operative while the contract is still executory.

There is another distinction which is noted by the author in Wait Engineering and Architectural Jurisprudence, Sec. 335, et seq. The author calls attention to the fact that the decisions adverse to arbitration clauses have been chiefly confined to insurance and general contract obligations where the difficulties attending execution do not require their use and support. While in construction contracts the engineer or architect by reason of his skill and special training is both witness and judge. He is in the position of a judge of a higher court, possessed of all the evidence and acquainted with all and every circumstance, and therefore possesses full, adequate and complete means within himself to determine the merits of the case, and from a practical standpoint the engineer is more competent to determine the questions at issue and to form a practical judgment than are Courts and juries.

"This, it is submitted, is a true reason for the existence, and a real cause of the persistence and universal use of such stipulations."

"The magnitude, extent and great cost of engineering and architectural work commend them to the Courts for a favorable construction according to their true intent and meaning * * * Few capitalists, corporations or public institutions would invest their wealth in enterprises in which their rights and differences with contractors were to be submitted to an ordinary jury whose sympathies are distinctly with the contractor and against the so-called monopolies, and whose decisions would be based upon the knowledge and experience acquired in the shop, in trade, in husbandry, or in the practice of the polite professions."

If, while this contract was being kept alive by both the McClintic-Marshall Company and the Scandinavian-American Building Company, these disputes had been submitted to arbitration and determined by the arbitrators, then the McClintic-Marshall Company would have had the undoubted right to file and foreclose its lien in either the State or Federal Court. No one would then contend that any court had been ousted of jurisdiction by that clause. No Court should hold that if the vendor breaches his contract of sale, when the contract provides for installment deliveries as this contract does, that the vendee does not have the election to keep the contract in force and re-coup or offset his damages, but must declare the whole

contract at an end. This is contrary to the elementary law of sales. Yet that is precisely the position into which the McClintic-Marshall Company placed the Building Company in this suit. It did not ship the steel in accordance with the terms of the contract, thereby causing loss and the payment of a higher freight rate and it admitted in open Court that a part of its steel was improperly fabricated, it admitted that after it was in default but before it shipped the steel it refused to arbitrate, the Building Company was then placed in this dilemma, if it held the contract breached it had to get this steel from other sources, which would probably mean even greater delay; if it held the contract in force, it must submit to the filing and foreclosure of a lien with the great expense consequent thereto under our state statute (the McClintic-Marshall Company was allowed $12,500.00 in attorneys' fees alone as costs in this action). Under these circumstances for the Court to hold that an agreement to determine such disputes before it became necessary to enforce lien rights is against public policy, we submit, is an erroneous conclusion. It is unreasonable under the exigencies of modern business and places the property owner at the mercy of the defaulting contractor and can have but one result, namely, to deter the construction of large improvements upon real property.

3rd. We also contend that the breach of the arbitration clause of the contract by the complain-

ant was a bar to the prosecution of this case in the Court sitting as a Court of equity.

The familiar rule that he who comes into equity must come with clean hands prevails.

In *Harcourt vs. Ramsbottom*, 1 Jac. & W. 505, Lord Eaton refused an injuction to restrain the sale of estates pursuant to an arbitrators award, made after the arbitration had proceeded and then been formally revoked by deed of the party who applied for the injunction. It was contended to sustain the award that the submission had been made a rule of court and could not be revoked but Lord Eaton ignored this matter and based his decision upon the ground of want of equity—that the complainant had not come into court with clean hands, whether he had or had not a right to revoke, whether his revocation was or was not effective and whether the award after revocation was or was not invalid.

To the same effect is the English case of *Pope vs. Duncannon*, 9 Sin. 177, 2 Jur. 178, where, although the right to breach an arbitration covenant was conceded, the court refused equitable relief to the offending party.

Where the rules of a Board of Trade provided that the difference between the members should be submitted to arbitration and the complainant had expressly contracted to submit such differences to arbitration the Court refused to prevent such arbitration in the case of *Albers vs. Spencer*, 103 S. W. 532.

Where an inventor made a contract with a manufacturer for Royalties, etc., assigning to the manufacturer certain rights, the contract having an arbitration clause in it and the inventor claimed the right to have the contract and the assignment set aside because of certain acts of the manufacturer, which he claimed were breaches of the contract, the Court refused to grant him equitable relief because he had refused to submit to arbitration under the contract. *Lesser vs. Baldridge*, 38 Mo. App. 362.

This is also illustrated by the case of *Cole vs. Cunningham*, 33 L. Ed. 538, in which the Supreme Court decided that the Massachusetts State Court could enjoin a citizen of Massachusetts from prosecuting a suit in the New York State Court by which he would have been able legally to obtain rights which the Massachusetts State Court would not have given him. Had therefore, the Scandinavian-American Building Company applied to the Pennsylvania State Courts to enjoin the McClintic-Marshall Company from prosecuting this action, the Pennsylvania Court at least would have had the *power* to have granted that injunctive relief. Had the McClintic-Marshall Company been within the jurisdiction of the State of Washington, a situation on all fours with the situation in the case of *Cole vs. Cunningham* would have been presented. In the Cole case the creditor by proceeding in New York was seeking to obtain rights superior to the rights of other creditors in the estate of an

insolvent, and by attaching property in New York, had placed himself in a position to legally enforce those preferential rights in the New York State Courts. The Massachusetts Court held this was a fraud on the Laws of Massachusetts, and enjoined him.

In this case the McClintic-Marshall Company—the creditor—by proceeding in the Federal Court is seeking preferential rights in the estate located in Washington, of the insolvent Scandinavian-American Building Company which it could not obtain either in Washington, the place where the property is situated, or in Pennsylvania, the State where it is domiciled and the state where its rights arose and completely accrued.

It would be inequitable therefore for the Federal Court to permit the McClintic-Marshall Company to gain rights as against the other general creditors of the Scandinavian-American Building Company, which it could not have had either in Washington or Pennsylvania. To do so is to permit a fraud upon the laws of both Washington and Pennsylvania, and a Court of Equity prevents fraud rather than lends its assistance to the wrongdoer.

4th. The arbitration clause contained in the contract is valid.

In this connection we desire to call the Court's attention to the public policy of the United States as the same is shown by numerous recent enactments of Congress. Labor disputes, freight rates

and various other questions of public interest are now the subjects of fixed governmental control and regulation before boards of arbitration brought into existence by statutory law. In one of the recent enactments of Congress the statement is made that the fundamental doctrine of this country is that international disputes shall be settled by arbitration.

In the numerous contracts made by the government in handling its war contracts clauses of arbitration were universally embodied.

It is interesting to note that although the rule that arbitration contracts are unenforceable was adopted from the English Common law, the Courts of England have recently repudiated this doctrine entirely with the statement that the doctrine was "judicial error". In the case of *Rederiakliebolaget Atlanten vs. Akleeselekabet Korn-og Federstof Kompagneit*, 64 L. Addn. 586, the Court will find an extensive brief filed by Amicus Curie in which the United States Supreme Court was asked to lay at rest this question and come out definitely in favor of arbitration clauses. In that case the Court refused to do so, but we submit there can be no question but what the public policy of the land and the trend of judicial thought is all in favor of such clauses.

Although we have examined innumerable authorities with reference to this matter, we submit that there are remarkably few decisions of the Supreme Court of the United States which contain

anything that can be said to be unfavorable to arbitration clauses when contained in building contracts. The decisions of the Supreme Court of the United States in construing the Wisconsin statute, which attempted to make every foreign insurance company which applied to do business in Wisconsin agree that it would not remove any cases against it to the Federal Court, are most frequently cited as authority to the effect that arbitration clauses are invalid. These decisions of course, are no authority at all except for the broad statement that the Court will not be ousted of jurisdiction in such manner.

Arbitration clauses in building contracts are sustained time and time again by the United States Courts when they contain clauses which provide that the decisions of the architect or engineer in charge of the work shall be final in all matters of dispute, between the parties. It is true that in most of these cases the Architect or engineer actually made decisions and it was therefore easy for the Court to say that the matter had already been submitted under the terms of the contract. But we submit that the distinction so made is in reality no distinction at all since ordinarily the decision of the engineer or architect can be obtained by the parties in interest without consultation with each other and without any particular hearing or act of the parties.

However, there are numerous instances in the Federal Courts where these clauses are sustained

in one way or another.

The Courts have said that where parties are competent to make contracts, arbitration clauses will be upheld and that such clauses do not oust the Court of jurisdiction, but are considered as valid and as merely disposing of auxiliary, collateral and incidental issues.

Conners vs. U. S., 130 Fed. 609;
Conners vs. U. S., 141 Fed. 16.

The Courts have also said that when persons fix on a certain mode by which their rights are to be ascertained, the one who seeks to enforce the agreement is bound to prove that he has done everything he could to carry it into effect and that he cannot recover on the contract unless he procures the kind of evidence required by the contract or show an adequate excuse for his inability to do so.

United States vs. Roberson, 9 Pet. 319, 9 L. Addn. 142;
Hamilton vs. Liverpool, 136 U. S. 242;
Perkins vs. U. S., 16 Fed. 513.

In this connection we call the Court's attention to the fact that a clause whereby a contractor agrees to arbitrate all matters of dispute arising under the contract has been held to be a waiver of the right to file a lien. This was directly decided in the case of *New York Lumber & W. W. Company vs. Schneider*, 1 N. Y. S., 441, which was affirmed by the Court of Appeals of New York in 27 N. E., p. 4.

But whether the Court would care to go to that

length or not it seems to us, as we have stated, that equity, at least, would require the complainant in this case to come into court with clean hands when he comes, as he does, invoking the powers of the Court sitting as a court of equity. And it cannot be said that a man who deliberately makes a contract in the state of his domicile, held by the Supreme Court of the state of his domicile to be good and enforcible, is doing equity by seeking the federal jurisdiction in order to relieve himself of the burdens of his contract, and the results of his breach of that contract.

2. The lien waivers were valid and binding.

Article XIV of each of the contracts is as follows:

"And the contractor further agrees for himself, his heirs, executors and assigns to waive any and all right to mechanics' claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract."

It must be conceded that this is a valid and binding contract obligation enforcible in the State of Washington.

> *Holm vs. C. M. & St. P. Ry.*, 59 Wash. 293; 109 Pac. 799;
>
> *Gray vs. Hickey*, 94 Wash. 370; 162 Pac. 564;
>
> *Kent Lumber Co. vs. Ward*, 37 Wash. 60; 79 Pac. 485;
>
> *Davis vs. La Cross Hospital Assn.*, 99 N.

W. 351; 1 Ann. Cas. 950 & note;

Hume vs. Seattle Dock Co., 137 Pac 752; 50 L. R. A. (N.S.) 153 & note;

Baldwin Locomotive Works vs. Hines Lumber Co., 125 N. E. 400; 13 A. L. R. 1059 & note;

Kelly vs. Johnson, 251 Ill. 1391; 95 N. E. 1068; 36 L. R. A. (N. S.) 573 & note;

27 CYC 261, et seq.;

18 R. C. L. 104, et seq.

In *Baldwin Locomotive Works vs. Hines Lumber Co., supra*, the Supreme Court of Indiana said:

"That no public policy is involved is shown by the fact that courts of last resort in four states have declared statutes void which attempt to nullify stipulations against liens. *Palmer vs. Tingle*, 55 Ohio, 423; 45 N. E. 313; *Waters vs. Wolf*, 162 Pa. 153; 29 Atl. 646; *Kelly vs. Johnson*, 36 L. A. A. (N. S.) 573 and note; 251 Ill. 135; 95 N. E. 1068; *John Spry Lumber Co. vs. Sault Sav. Bank, Loan & T. Co.*, 77 Mich. 199; 6 L. R. A. 204; 43 N. W. 778".

It is argued that the right of lien revived when the Building Company ceased its building operations. The facts disclosed on the trial simply indicated that the lien claimants voluntarily quit their work when the bank failed and waited to see what was going to happen.

Of course, it is self-evident that a waiver of lien never becomes of any value or effect until the contract is breached by the owner. It merely lies

dormant awaiting the development of facts or circumstances that bring it into operation. We are at a loss to understand how it can be logically argued that the right of lien is automatically revived solely upon the happening of events that make it of any value. The parties contracted to waive their right of liens and resort to the personal responsibility of the owners with a full understanding that the contract might be breached and in that event they could not resort to their statutory lien rights. If they had been paid in full they certainly would have no lien rights.

In *Dux vs. Rumsey*, 190 Ill. App. 234, it was claimed that because a sub-contractor was not paid in full "the consideration for the waiver has failed". But the court refused to so hold and said:

"When parties insert in a carefully prepared contract between them provisions like section 8 of this subcontract, a reasonable interpretation of the contract requires the court to presume that some purpose was intended to be accomplished by such provision. If the construction contended for by the subcontractor here is sustained, it makes the subcontract mean that the subcontractor waives his lien in case he is paid in full. The law gives him no lien if he is paid in full. Therefore the proposed construction deprives section 8 of said contract of all meaning and leaves the contract as it would be if that section had never been written into it."

We find that the weight of authority is to the

effect that a waiver of lien is not disregarded and the lien right restored by the owners failure to pay according to the terms of the contract.

Fuhrman vs. Frech, 60 Ind. App. 349; 109 N. E. 781;

Carson-Payson Co. vs. Cleveland, Etc., Ry. Co., 105 N. E. 503;

Bizezinski vs. Neeves, 93 Wis. 567; 67 N. W. 1125;

Gray vs. Jones, 47 Or. 40; 81 Pac. 813;

Kelly vs. Johnson, 251 Ill. 139; 95 N. E. 1068; 36 L. R. A. (N. S.) 573 and note;

Long vs. Caffery, 93 Pa. 528;

Mathews vs. Young, 40 N .Y. Supp. 26;

Sanders' Pressed Brick Co. vs. Barr, 76 Mo. App. 380;

Cushing vs. Hurley, 112 Minn. 83; 127 N. W. 441;

Arizona E. R. Co. vs. Globe, 129 Pac. 1104;

Collinsville Mfg. Co. vs. Street, 196 S. W.;

Dux vs. Rumsey, 190 Ill. App. 234;

27 CYC 266.

Collinsville Mfg. Co. vs. Street, 196 S. W. 284. The Plaintiff entered into a written contract with the Jones Building Company, the original contractor for the erection of a building known as Dallas Hotel, for the Southern Methodist University. By the terms of its contract the Collinsville Company was to furnish and erect the sheet metal work and copper roofing, payment being provided for monthly during the progress of the work on

the basis of eighty-five per cent of the estimated value of work done and material furnished during the preceding month. By the contract the Collinsville Company expressly waived and released any lien for labor performed and material furnished. The company proceeded with the performance of the contract until the institution of bankruptcy proceedings against the Jones Company, although for several months prior to such proceedings it had not been paid the full eighty-five per cent of the monthly estimates. The action was one to establish a lien. The court held, in affirming the judgment of the lower court, that the lien was waived and not re-established through the failure to pay as provided by the contract, nor by the bankruptcy proceedings of the principal contractor, and that the lien could not be re-established by subsequent contract made with the receiver for the Jones Company, wherein there was no waiver clause, such subsequent contract being intended to provide for the completion of the work under the original contract.

Mowers vs. Jarrell, 210 Ill. App. 256, holds that a waiver of lien given to enable the owner to get a loan to pay for the improvements, is supported by an adequate consideration, and not affected by the owner's subsequent default in connection with that contract.

It was claimed and the court found that there were misrepresentations made prior to the execution of the contracts. We maintain that is not sup-

ported by the testimony. We call the court's attention to Article XX of each contract which is as follows:

"Art. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in in any respect except by the mutual consent of the parties endorsed herein in writing and duly executed."

This agreement is binding and the terms of the contracts cannot be altered by oral testimony.

The contract of the Tacoma Millwork Supply Company is set forth in the transcript of record on pages 180 to 199; that of Ben Olson on pages 309 to 318; that of E. E. Davis on pages 382 to 391.

Ben Olson, President of Ben Olson Company, testified:

"Mr. Drury told me that they were going to put the $600,000 mortgage on. I took it for granted that was going to be the mortgage on the property. I had no reason to think there were other mortgages on there * * *. I knew that this $600,000 mortgage was to be put on these premises at the time I signed this contract but the mortgage was to cover the completion money, not at the beginning as I understood."

Miss Carlson, the secretary to the architect, said

she was present at the conference with the architect and contractors. She testified as follows:

"I heard a great deal of discussion, all of them in fact objected to signing the contract. To some of them the matter was explained satisfactorily and they went ahead and signed it; and others refused and had the clause stricken out. They represented that the loan was about to go through; I do not believe there was any representation that the loan had actually been made."

It cannot be said that the testimony as to misrepresentations is sufficient to justify a finding that the representations were fraudulently made. In fact, the court says the representations were incorrect but not fraudulent. 281 Fed. at page 172.

We would remind the court that there is a nice distinction between a fraudulent misrepresentation such as will give rise to an action for deceit, and an honest misrepresentation as to a material fact or condition. But since we believe under the authorities hereinafter cited that this distinction is immaterial, and the entire question of fraud and misrepresentation taken out of the case by the action of the parties themselves, we will not attempt to go into the distinction and into the different rights and remedies which follow in the two classes of cases. Assuming then that there has been a false misrepresentation established, upon which the lien claimants who waived their liens acted upon discovery of that fraud, such claimant might pursue one of two remedies. Either he

could rescind the contract, restore any benefits that he had received thereunder and sue as upon a *quantum meruit* for the value of the work done or services actually performed, or he could elect to affirm the contract and sue for damages occasioned by the fraud. As will be pointed out in the authorities cited, the remedies set forth are inconsistent one with the other, and any election to pursue the one remedy results in the exclusion of the other. In the instant case the lien claimants, Tacoma Millwork Supply Company, and Ben Olson Company, are seeking to rescind the contract so far as the clause relating to the waiver of lien is concerned, and to affirm it otherwise, and to recover damages in the shape of profits which they would have made on the contract itself had it been completely performed. By filing a notice of claim of lien embracing a claim for profits upon the contract, by bringing suit upon the contract and for damages in the shape of lost profits, and by electing in open court to treat the contract as indivisible and entire, they have elected to affirm the contract. They cannot therefore seek to rescind the one clause of the contract relating to the waiver of liens.

"Partial recision. A recision must be in toto. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two

independent contracts."

13 C. J. Contracts, Sec. 682, P. 623, and cases cited in note 80;

Girouard vs. Jasper, 106 N. E. 849. (Mass.)

This was an action to enforce a mechanics' lien for labor performed. The claim for the lien was based upon a written contract as to which the court said:

"To enforce the lien filed by him in this case the petitioner declares upon the contract and alleges full performance of all its stipulations on his part to be performed. It therefore appears that the petitioner bases his claim for lien upon the complete performance of the entire contract. The contract provides that 'the balance, namely $3500, is to be paid to the said contractor after the owner has secured on said property first and second mortgages, but said payment of the balance due shall not be made later than six months from the date of the completion of the work' ".

The claim was made that false representations were made by the defendant Jaspar as to the existence of mortgages upon the property when the contract was entered into. The Supreme Court of Massachusetts reverses a judgment for the lien claimant, and dismisses the petition of the plaintiff upon the ground that at the time he filed his claim upon the contract there was nothing due by the terms of the contract, the court saying:

"The respondent contends that although the jury found that fraud was practiced upon the

petitioner by the respondent, yet the petitioner having failed to rescind the contract and having completed it after knowledge of the fraud, has waived the fraud and is bound by its terms. It is plain that if a party to a contract seeks to avoid it by reason of the fraud or failure of the other party to comply with its terms, he cannot rescind it as to some of its provisions and rely upon it as to others. In order that this lien may be maintained it must appear that the petitioner has substantially performed his part of the contract, and *it must further appear that there is nothing in the contract itself which will prevent the establishment of the lien.*" (Italics ours. * * * "If he (the petitioner) was induced to make the contract by reason of the fraudulent representations of Jaspar, on discovery thereof he could have rescinded it as a whole, and have brought an action at law for its breach, or he might have brought an action declaring upon a *quantum meruit* for the value of the labor and material furnished, or he could have availed himself of the remedy provided for the enforcement of a mechanics' lien to recover for the value of the labor and materials furnished.'

Bernard vs. Fisher, 177 Pac. 762 (Idaho).

The Syllabus is as follows:

"A party to a contract, the provisions of which are not separable, cannot avail himself of, and benefit by, some portions of it and repudiate others, nor can he rescind some parts of it, and enforce others. It must be nullified in toto or not at all.

Having elected to sue upon certain of its terms, he is bound by all of them."

The action was one to foreclose a lien for work done and materials furnished in the construction of an irrigation system. The action was based upon a contract dated September 10, 1912, one of the provisions of which gave the owners an option to pay for the work by the assignment of certain water rights and a certain mortgage. At the trial it appeared that the plaintiffs had received the mortgage and the notes secured thereby and also the water rights specified. Evidence offered by them to show that the mortgagor did not own the land described in the mortgage, and that the water rights were not such as he had been agreed they should receive, were excluded, and judgment went against the plaintiffs upon the counter claim of the defendants. The court said:

"Appellants (the lien claimants) do not seek to rescind the contract in toto and to recover the reasonable value of their services and materials. They do not allege that they were induced by fraud, misrepresentation or mistake to accept the water rights and mortgage, in ignorance of their real character, nor do they, having failed to return the property delivered to them or to allege any reason for their failure to do so, sue for the damage resulting from the difference between that which they received and that which they contend they were entitled to. Having retained this property they must be held to have retained it in full

payment of the amount due under the contract, and cannot be heard to say they accepted it in partial payment or on account. *They attempted in this action to avail themselves of the portion of the contract which fixes the amount of their compensation, and they cannot repudiate but must be held to be bound by the provisions thereof, which gave respondents an option to pay with water rights and a mortgage instead of money.*" (Italics ours).

Cole vs. Smith, 58 Pac. 1086 (Col.)

This action was one for deceit, based upon false representations made by defendant Cole, concerning the number of cattle owned by him, which he exchanged with the plaintiffs for real estate. The contract provided that in case of default in the contract in the matter of the delivery of the cattle defendant Cole would forfeit and re-transfer a portion of the real estate which he was to receive in exchange for the cattle. Judgment went for the plaintiffs in the lower court, but was reversed, the court saying:

"When the plaintiffs discovered that they were defrauded, at least two remedies were open to them: First, to rescind the contract; second, to sue for damages on account of the deceit. These remedies are inconsistent; not concurrent. Both were not open to plaintiffs; and when once they made their election to sue for damages they were bound thereby, and could not thereafter pursue the other remedy. In choosing, as they did, to bring this action for damages, they thereby affirmed the con-

tract, and, if they recover at all, it must be upon the case as made, and not upon some other theory. Had they elected to rescind, the contract must have been rescinded in toto; and when they did elect to sue for damages on account of the deceit the contract must be affirmed in toto, and not affirmed in part and disaffirmed in part. *Potter vs. Titcomb*, 22 Me. 300; *Bank vs. Groves*, 12 How. 51; *Cobb vs. Hatfield*, 46 N. Y. 533, 536; *Schiffer vs. Dietz*, 83 N. Y. 300; *Moller vs. Tuska*, 87 N. Y. 166; *Nichols vs. Pinner*, 18 N. Y. 295, 312; *Joslin vs. Cowee*, 52 N. Y. 90; 8 Am. & Eng. Ec. Law (1st Ed.) 650 et seq."

Federal Life Ins. Co. vs. Maxam, 117 N. E. 801 (Ind.).

"The act of bringing an action, or taking legal steps to enforce a contract, amounts to an election by the party not to rescind it on account of anything known to him, and where a party institutes a suit for damages for the breach of an executory contract, his action in so doing is notice to the other party of his election to treat the contract as breached, and at an end, except for the purpose of ascertaining the damages occasioned by such breach. An election so made is conclusive against the party making it. 3 Elliott on Contracts, Sec. 2026; *Cole vs. Smith*, 26 Colo. 506; 58 Pac. 1086-1087; *Conrow vs. Little*, 115 N. Y. 387-393; 22 N. E. 346; 5 L. R. A. 693; *Graves vs. White*, 87 N. Y. 463-465."

Collison vs. Ream, 144 N. W. 1050.

"It is an elementary maxim that one who seeks

equity must do equity. He cannot accept that portion of the contract which is beneficial to him and at the same time reject and seek to be relieved from that portion which he believes to be injurious to his interests." (Opinion p. 1053.)

See also *Cheney vs. Bierkamp*, 145 Pac. 691, at 692 (Colo.).

Walker vs. McMillan, 160 Pac. 1062.

J .L. Owens Co. vs. Doughty, 110 N. W. 78 (N. D.).

As to what constitutes an election of remedies and the election thereof we refer the court to the opinion of Sanborn, J., in *Stuart vs. Hayden*, 72 Fed. 402, at p. 411, affirmed in 169 U. S. 1, 42 Law. Ed. 639.

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages; or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other because a sale can not be valid and void at the same time."

Sea Nat'l Bank vs. Powles, 33 Wash. 21, at pp. 27-28.

The contracts in which the parties waived their right of lien should be sustained and enforced and the decree reversed.

3. The appointment of a Receiver bars the action as a lien foreclosure suit.

As the Court will notice by a reference to the order appointing the Receiver herein the Court made him a general receiver and his duties and powers were in no wise limited to the confines of this action or to preserve the property pending the final determination of the suit. He was appointed upon the application of the Tacoma Mill Work & Supply Company (Tr. p. 40) who were asserting a lien but who the Court thereafter found had no lien as to the greater portion of their account. (Par. XXV, Tr. pp. 512-13-14.) One of the grounds for his appointment was the insolvency of the Scandinavian-American Building Company. While it is elementary that the appointment of a receiver does not disturb existing liens or equities in the property, it is equally well established that the property of the insolvent from the time of the appointment of the Receiver is *in custodia legis* and that persons asserting rights therein or liens thereon while it remains *in custodia legis* must apply to the Court appointing the receiver to fix the amount and priority of their claims in the property. The Court had ample power in the case as a receivership case to determine all of these questions. And the reason for that rule is well illustrated by the case at bar. In this case the court allowed the lien claimants approximately $30,000.00 in costs, expenses and attorneys' fees. (Tr. p. 477 et seq.) While we believe it is im-

probable that this "steel skeleton" will bring enough to pay all lien claimants in full, yet it is possible that it will, and in that event this $30,000 would be saved to the general creditors.

When a corporation becomes insolvent and its assets pass into the hands of a receiver, the situation is analogous to bankruptcy and the appointment of a trustee. And it is elementary that thereafter lien claimants would be required to at least suspend existing lien foreclosure suits and present their claims in the bankruptcy court. The situation is also analogous to the death of an individual owner in which case, in Washington at least, the claimant would have to suspend his action and present his claim to the administrator.

> *Crow Co. vs. Adkinson Construction Co.*, 67 Wn., 420.

The practice in Washington has been to file the lien and then to proceed in the receivership proceeding, not to foreclose, but to establish the amount and priority of the lien as against the property or funds in the receiver's hands. This is illustrated by the case of *Brown vs. Hunt & Mottet Co.*, 111 Wn., 564, wherein among other things the Court says, quoting from *Withrow Lumber Co. vs. Glasgow Inv. Co.*, 101 Fed. 863:

" 'The appointment of a receiver does not alter or affect the rights of the parties to property, or give or take from them any liens they have acquired or are entitled to'. *It in no way prevents one from filing his claim of lien in the office of the County*

Auditor. It only changes the procedure and possibly postpones the collection."

In Atlantic Trust Company vs. Dana, 128 Fed. 209, Judge Van Devantes uses very similar words:

"The existing receivership did not impair the pledge, or render the property or its income less subject to the mortgage of the trust company, than if the property was still in the possession of the water company. *It altered the situation only to the extent that it affected the manner in which the pledge should be asserted to make it effective.*"

"By taking the property through the receiver, the Court has placed itself, so far as such senior mortgages are concerned, in the position of the mortgagor, *and that their only remedy is by application to the court.*"

(Quoted from *Seibert vs. Minneapolis & St. L. Ry. Co.*, 52 Minn., 246.)

In *Berwend White Coal Co. vs. Steamship Co.*, 166 Fed. 782-795, the court says:

"This court interposed by its receiver and it should, on this intervening petition, give the lienor a remedy, *although in form of a wholly different character from that provided by statute.*"

In *Commonwealth Roofing Co. vs. N. A. Trust Co.*, 135 Fed. 984, the Court says:

"By appointing a receiver of the property upon which the lien attached, the Circuit Court assumed the control thereof, and of the lienor, *and stood in its path * * *.*"

The Federal Court in the case of *Blair vs. St.*

Louis Etc. Ry. Co., 25 Fed. 2, held where the lien claimant did establish his lien in the State Court subsequent to the appointment of a receiver by the Federal Court, although the suit of the lien claimant was first in point of time, that nevertheless he was not entitled on petition to the Federal Court in the receivership matter to have his lien judgment established as a prior lien; that his remedy in the first instance was by petition in the receivership proceeding, and he having refused to avail himself of that remedy, that the court would not assist him.

That the lien claimant ordinarily, in the absence of peculiar circumstances, must proceed by petition to the court appointing the receiver is shown by the cases of *Cohen vs. Gold Creek M. Co.*, 95 Fed. 580, and *Scott vs. Farmers L. & T. Co.*, 69 Fed. 17, where the circumstances warranting it, the lien claimants were allowed to foreclose by suit.

That the lien claimant's rights to foreclose in the ordinary way is suspended by the appointment of a receiver has been directly decided.

> *Fisher Foundry Co. vs. Susquehannah Co.*, 23 Lanc. L. Rev. (Pa.) 398;
>
> *De Vasson vs. Blackstone*, 7 Fed. Cas. 3, 840; 6 Batchf. 235.

The very fact that the procedure for which we contend, has been universally followed by practitioners, it seems to us, should have great weight with this Court.

The sanction of the practice adopted, we sub-

mit, would lead to very unfortunate results, as is illustrated by this case. If the building in this case should sell for enough to pay the lien claimants, in accordance with the provisions of the decree, it will mean that there has been $30,000.00 wasted, as far as the general claimants are concerned; this sum, would be enough to give them a substantial dividend. The underlying reason for the appointment of a receiver is to place the fund or property in the hands of the court, not only for proper distribution, but for economical administration—the foreclosure in this case was a useless thing, the same result would have been achieved by taking the evidence merely for the purpose of establishing the amount and rank of the various claims, and this unnecessary burden of costs would all have been saved.

We therefore respectfully submit that the decree in this case should be reversed.

GUY E. KELLY,
THOMAS MACMAHON,
Attorneys for Receiver.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BRICK LIME & SEWER COMPANY, a corporation,
Appellant,

vs.

MCCLINTIC-MARSHALL CO., *et al,*
Appellees.

BRIEF OF RECEIVER

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Filed this........................day of March, 1923

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By...Deputy Clerk.

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BRIEF OF RECEIVER

This appellant corporation made a contract with the Scandinavian American Building Company on February 28, 1920, whereby it agreed to furnish the terra cotta to be used in the building then being built by the building company on Lots 10, 11 and 12 in Block 1003 Map of New Tacoma in Pierce County, Washington. This Contract among other things contained the following clause: "should the contractor be delayed in delivering his material, by the owner, certificates are to be given for payment for material completed in the factory". The

contract further provided that the whole purchase price of the terra cotta should be $109,000.00; that the delivery of the material should commence within 4 months from date and be completed within 6 months from date; payment should be made for the material monthly, 75% in cash of the estimated value of the material delivered and the balance of 25% from 30 to 60 days after the completion of the contract. (Tr. p. 584 et seq.) The contract itself did not provide where the material was to be delivered but the appellant had made a written proposal dated February 19, 1920, to furnish this terra cotta, which contained the following clauses: "we agree to give you, free of charge, the services of an experienced terra cotta setter and fitter".

"This price of $109,000.00 is for delivery at the building site."

The plant of the appellant is located at Clayton near Spokane, Washington, and the appellant had about 400 feet of storage space at its plant.

Its president and the superintendent of its terra cotta department came to Tacoma on August 10, 1920, bringing with them a statement, prepared in accordance with the contract, and showing that the appellant had ready at the factory terra cotta of the estimated value of $29,500., which statement contained the following clause: "as per terms of contract in Article V. 75% of $29,500.00 * * * $22,-125.00" (Tr. p. 823), and in accordance with that

statement the appellant was paid $20,000.00 by the building company, so that it is apparent that the terra cotta which was thereafter shipped from the appellant to Tacoma was the terra cotta covered by this statement.

Thereafter and in September the appellant began to ship terra cotta to Tacoma. The appellant got in touch with a Mr. Kellogg, who in turn brought it in touch with a Mr. Fritch of a Tacoma concern known as "The Local & Long Distance Transfer & Storage Company" who suggested that the material shipped by the appellant to Tacoma might be stored in the Great Northern Freight sheds, and arrangements were made by the appellant with the Great Northern giving the appellant the right to store its material on some lands belonging to the Great Northern and adjoining its freight sheds. (Tr. p. 827-828.)

As to the reason why this was shipped to Tacoma, if that is material in this case, although the appellant's officers testified that it was done for the convenience of Mr. Wells who was the superintendent of the building under the architects, we submit that the testimony of the appellant leaves a great deal of room for doubt on that subject. For instance, Mr. Bryan at one place in his testimony states "I discussed with him (Wells) myself personally on the matter of delivery of the material in Tacoma *and obtained their permission to do so.*" (Tr. p. 797.) And again he said "We

started it before Mr. Wells,—in other words we took it from the piles. Our first shipment was taken from the piles prematurally, we moved it to save reloading and to save restoring, shipped it to Tacoma." (Tr. p. 799-800.) Again he said "we had no place to store it" referring to the unfinished product in their yard. (Tr. p. 804.)

Mr. Fosseen, the president of the appellant stated: "Mr. Wells spoke to me about the terra cotta shipped to this point saying it would cost no more to ship it over here and unload it than it would to keep it in Spokane". (Tr. p. 810.) And again "getting the material over here would be just a question of service. It was in our way there and cost us money to come over here;" and again, "we have to have a certain amount of fitting and this was blocking the yard and we didn't have enough room in the yard or in the fitting shed or storage shed, so I put it outside with a temporary roof over it and we were ready and anxious to make delivery," referring to some material which the appellant had ready for delivery in November. (Tr. p. 816.)

So that even from the verbal testimony of the appellant's officers it is somewhat doubtful that the appellant shipped this material to Tacoma, as the appellant's brief might lead the court to believe, merely for the purpose of acommodating the building company. This theory is also at variance with all of the correspondence between

the parties during that period of time. In November the appellant wrote a letter to the building company in which it stated that it was enclosing another statement of the terra cotta manufactured and ready for shipment at its plant and demanding, in accordance with the terms of that statement $12,000.00 under the contract, which letter contains the following clause: "we are ready to make shipment of 211½ tons and until we get payment for same or until you are ready to receive it at the building we will not ship same—until either one of these propositions are completed".

"However, if you do pay the $12,080.50 we will do as we have been doing—shipping the terra cotta and have it go to Tacoma and be ready for you. You can see that this is not in our contract to rent ground space and unload and reload again but we do that so as to make certain that the car shortage would not delay the delivery of the terra cotta." (Tr. p. 813.)

This letter was dated November 5th and was in answer to a letter of November 4th written by the superintendent of the building company urging shipment, in which Wells said to them "When will you be ready to cornice at the first office floor? So far the material you have shipped does not give us enough to start at any particular point." (Tr. p. 802.)

A representative of the appellant called on Mr.

Drury and Mr. Larson at the office of the building company at the time that this demand for $12,-000.00 was made and at that time the building company refused to pay this $12,000.00 on the ground that the terra cotta as shipped to Tacoma was so incomplete that it could not be used to advantage. (Tr. p. 826.) They received the assurance of the officers of the company that as soon as the terra cotta was complete that the building company would pay for it when it arrived in Tacoma.

This terra cotta which was shipped to Tacoma was not consigned to the building company. "That material that was shipped to Tacoma was consigned to the Local & Long Distance Transfer Company, a Tacoma concern. They took care of the material for the Washington Brick Company, transferring it to the storage yards. We employed them and paid that expense and I think our company paid the rent on the storage yard." (Tr. p. 802.)

On January 15, 1921, when the Scandinavian American Bank of Tacoma failed, the appellant had shipped to Tacoma and was holding in Tacoma approximately one-half of the terra cotta which it had contracted to furnish. This was of the approximate value of $58,000.00. Approximately one-fifth of this material was on hand at the plant of the appellant and ready for shipment—the balance was in various stages of manufacture. At that time, this terra cotta on hand at the factory was loaded on

cars at the plant of the appellant for shipment to Tacoma, and upon being notified that the bank had failed, the officers of the appellant immediately caused this to be unloaded.

The appellant thereafter filed its lien against the property of the building company on February 24, 1921, in which it set forth that there was due to it $89,000.00, and claiming a lien upon the property for $89,000.00. (Tr. p. 865.) Thereafter the receiver was appointed by the court. Thereafter negotiations were entered into between the receiver and the appellant with a view to seeing what could be done toward getting the terra cotta and putting it on the building for the protection of the steel, which negotiations culminated in August, 1921, by the refusal on the part of the appellant to take either position, that the terra cotta belonged to it and did not belong to the receiver of the building company, or that the terra cotta belonged to the receiver of the building company and did not belong to it. The court will find a letter written to the appellant by the attorneys for the receiver demanding that they elect whether they would deliver the material for which they claimed their lien to the receiver without any restriction or dismiss their lien claim and retain possession of the terra cotta. (Ex-142, Tr. p. 817.) This letter was received by the appellant but they refused to elect, merely taking the position that the matter was in litigation and up to the court for decision.

ARGUMENT

As will be noted from the statement of facts which we have made there are two questions presented; first, whether or not the appellant is entitled to foreclose its lien by reason of the tremendously inflated lien which it filed. Secondly, whether or not under the circumstances of the case any terra cotta was furnished to the Building Company within the meaning of the lien statute.

With reference to the first question: The appellant proved on the trial the value of the material in its yards in Spokane which had been completely finished and also the value of the terra cotta partially manufactured but not finished. The appellant, however, does not now claim a lien for any cotta, except that which it had shipped to Tacoma. In view of the admitted fact that it was the duty of the appellant to ship this material to Tacoma, paying the freight thereon, and then to deliver it to the building company, paying the drayage thereon, it is apparent that the appellant could not possibly have any lien for the material which was unmanufactured or for the material which was manufactured but not shipped from Spokane. The court will notice that a portion of this terra cotta was all ready for shipment at the time that the appellant learned that the bank had failed and the appellant thereupon caused these cars to be unloaded. This is significant in that it shows that the terra cotta had never passed from under the

dominion and control of the appellant and under the elementary rules with reference to law of sales, there can be absolutely no question but that the title to this terra cotta at all times remained in the appellant. We submit, therefore, that any claim of lien for the unmanufactured or undelivered terra cotta at the works of the appellant near Spokane could not have been made in good faith and yet a reference to the lien filed will show that the appellant claimed its lien for the full contract price for this terra cotta allowing nothing for the unmanufactured and partially manufactured product, nothing for the loading of the material on cars in Spokane, nothing for the freight, and nothing for the delivery of the terra cotta from the railroad company in Tacoma to the building site.

The Supreme Court of Washington in common with most of the other courts of this country, has decided that a lien claimant who deliberately files a lien including therein non-lienable items thereby forfeits his right to foreclose for the lienable items. We think that the facts of this case clearly show that there could be no claim in good faith that the appellant was entitled to a lien on this building for the terra cotta which had not been yet fully manufactured, or for terra cotta which had not yet been put on cars in Spokane, and that it is equally clear that if the appellant did have a lien at all, it was only for the material which had actually been shipped to Tacoma, which was of the

value of $58,000.00, and upon which the appellant had been paid $20,000.00, so that the limit of the claim of the appellant was $38,000.00, whereas the lien filed by it was for $89,000.00.

As we view the matter the appellant in this case stands in exactly the same position that the appellants stood in the case of *Robinson vs. Brooks*, 31 Wn. 60, in which the Supreme Court of the State of Washington, says:

"The notice of lien sought to be foreclosed recites, in substance, that the appellants claim a lien for $110.00 for cutting 110 acres of wheat at the agreed price of $1.00 per acre. It also recites a breach of the contract by respondents, on account of which breach appellants sustained damages in the sum of $60.00 profits which appellants would have made had the contract been completed as agreed, and further damages in the sum of $60.00 by reason of appellants remaining idle for four days on account of said breach of contract and claim a lien for the sum of $230.00 less $24.50 paid thereon. The complaint prayed for the sum of $205.50, for foreclosure of the lien to satisfy the same and for the further sum of $100.00 attorney's fees and $10.00 cost for preparing and filing the lien * * *"

"If the appellants had a right to a lien on the grain in question, the amount of the lien was for $110.00, less the payment of $24.50, or $85.50.

Instead of filing a lien for that amount they filed a lien for $205.50, $120.00 of which was for items clearly not lienable under our statute. Appellants never supposed and they do not now claim that these items are lienable or inserted by mistake or inadvertance. They were wilfully inserted in the notice of lien, and a claim made therefor. It is manifest from the record that the claimants inflated their real claim for $85.50 to $205.50 and sued to foreclose the same for the full amount, besides $100.00 attorney's fees. The evidences of bad faith are so clear that the whole claim should fail."

We do not think the appellant has or ever had any lien claim, but if it did have one, the only item thereof which is even debatable is the item for the terra cotta which had been shipped to Tacoma and which the appellant's evidence shows to be worth $58,000.00, and upon which it had been paid $20,000.00. Instead of filing a lien for this $38,000.00, concerning which there might be a question, however, the appellant filed its lien for $89,000.00 (Ex. D. Tr. p. 280 et seq). This was not done inadvertently as is shown by the fact that the lien was filed on February 24, 1921, more than a month after the institution of this action. And in an attempt to stretch the allegations of its complaint to meet the statements of its lien claim as filed, the appellant did exactly what the appellants in the Robinson case did, that is, it alleged that it lost

profits to the extent of $5,000.00 (Par. 16-Tr. p. 226) and then asked the Court to foreclose this preposterous lien in the sum of $84,000.00 and to give it an attorney's fee of $10,000.00. (Tr. p. 229.) So that even adding the $5,000.00 to its lien claim as set forth in the allegations of this cross-complaint, those allegations fall $5,000.00 short of the amount claimed in its lien claim.

Upon the authority of the Robinson case this appellant should have been dismissed from this action for want of equity. The court, however, did not do this, but merely held that the terra cotta shipped to Tacoma by the appellant was so shipped for its own convenience, that there had been no delivery thereof and that the appellant had never parted with title to any of the terra cotta manufactured by it. It seems to us that this is a controlling feature of this case. In its brief the appellant cites many cases to the effect that it is unnecessary that material be actually used in the construction of a building, but that a lien claimant who has *delivered* material for use in a building may have a lien therefor. It seems to us, however, that it would be stretching the English language far beyond the breaking point for a court to hold that by the words "furnish for use in the construction" the Legislature meant to enact a law which would give a man a lien for material which he had never delivered to anyone except his own agent and to which he has title under the contract

of sale. Under the evidence in this case, this is the position of the appellant Washington Brick Lime & Sewer Pipe Company. It is true that it had shipped a portion of this terra cotta from its yards in Spokane to Tacoma, but this material was not consigned to the building company, but was consigned to a transfer company who were in the employ of the seller, and after arriving in Tacoma this portion of the terra cotta was stored on property rented by the seller. The Court will bear in mind that the written evidence here very clearly shows that the building company was ready to accept the delivery of the terra cotta manufactured by the appellant at least as early as November, for at that time letters were written to the appellant in which its attention was called to the fact that the terra cotta which it had delivered in Tacoma was not such as would give the building company anything to start on, and urging that the terra cotta for the lower floors be shipped, and it is significant that the appellant replied to that letter in substance stating that it would not ship the terra cotta manufactured and at its yards except under one of two conditions, namely, that it be paid 75% of the contract price of the material shipped, or that the material be delivered to the building site. This indicates very clearly that the appellant even at that time had in mind the possibility of filing this lien and recognized that unless there was a delivery at the building site that no lien would lie. The appellant's subsequent conduct further streng-

thens this view. As soon as it was advised of the failure of the bank it caused its terra cotta, then loaded on the cars, to be unloaded and placed in its yards. Thereafter and after the appointment of the receiver, when the receiver was thinking of attempting to place the terra cotta on the building to protect the steel, which was even after the appellant had filed its lien and was seeking foreclosure thereof in this action, the appellant refused to permit the use of the terra cotta, and refused to answer a letter directed to it requiring it to elect whether or not it would take the terra cotta and abandon its lien, or deliver the terra cotta and rely on its lien.

Certainly under these circumstances no one could say that the appellant "furnished" any material. The Washington Supreme Court has with certainty announced the rule that there must be a *delivery* of the material. A comparison of the cases of *Western Hardware & Metal Company vs. Maryland Casualty Company*, 105 Wn. 54, 177 Pac. 703, and *Holly-Mason Hardware Co. vs. National Surety Company*, 107 Wn. 74, 180 Pac. 901, clearly shows this. The opinion in the Western Hardware case was written a considerable length of time before the opinion in the Holly-Mason case. The Court will notice that Judge Fullerton who wrote the opinion in the Holly-Mason case was one of the Department Judges who concurred in the opinion in the Western Hardware case. So that

there can be no question but what our Supreme Court meant both these cases to stand as declaratory of our law.

Since these two cases are relied upon by all of the parties to this appeal, we believe that a discussion of them will materially assist the Court, particularly in view of the fact that, as we read them, they do declare the whole law of Washington on the question involved in this appeal.

In the Western Hardware Company case the the contractors contracted to furnish the material for, and install, a heating and ventilating plant in a school house. Under the law, they furnished a bond, with the defendant as surety, by the express terms of which they agreed to pay all persons who should supply subcontractors with supplies for carrying on the work. The contractors sublet the furnishing and installing of the sheet metal work of the heating plant to a subcontractor who conducted a sheet metal shop wherein he pressed and worked sheet metal into the form required for his jobs. The subcontractor bought on credit and accepted delivery from the claimant, of sufficient sheet metal in bulk to fulfill his subcontract under an express agreement that he would use it in the performance of his sub-contract. The claimant thereupon advised the contractors of this and notified them that it would hold them and their bondsman for payment. The sheet metal was delivered to the shop of the subcontractor rather than

at the building in order that he might form it for use in the construction of the heating plant, where he had proper tools and appliances for that work, and the contractors knew that the subcontractor contemplated pressing and shaping the material at the shop and he had their consent thereto. Only a portion of the metal was actually used for the purpose for which it was furnished, and the balance was probably disposed of by the subcontractor elsewhere. The question was whether the claimant could hold the bond for the whole bill or only for that portion which was actually used. The Supreme Court held that the claimant could hold the bond for the whole bill.

In the first place the Court will notice that this whole bill fell squarely within the express terms of the bond, which was an agreement to pay "all persons who shall supply * * * subcontractors with * * * supplies for the carrying on of such work". The decison of the Court was therefore right, no matter how it reasoned to arrive at that conclusion. In reasoning the case the Court notes that it had theretofore recognized the analogy between lien statutes and bonding statutes and particularly mentions that the lien statute by its terms makes the sub-contractor the agent of the owner, and calls attention to the fact that the bonding statute is broader in its terms than the lien statute.

The question presented to the Court in that case, and the question to which the Court directed

its argument was whether the claimant who had furnished material which was not actually used in the building could have a lien therefor and the question of the place where the delivery was made was entirely secondary. This is shown by the fact that the Court cites *Hutling Bros. vs. Denny Hotel Company*, 32 Pac. 1073, as controlling, and that it was contended that that case had been overruled by later decisions. In fact the Denny Hotel case is direct authority against the appellants contentions in this case. One of the material questions in the Denny Hotel case was whether or not the lien was prior to a mortgage covering the premises, which depended upon the question as to when the lien attached, and the Court says therein:

"It (the lien claimant) was to furnish the materials delivered at the building in the city of Seattle, *and it cannot be held to have attached before the delivery thereof.*"

The Court then proceeds to state that the appellant relied on the decisions in *Puget Sound Bank vs. Galluci*, 82 Wash. 144; *Lipscomb vs. Exchange Bank*, 80 Wn. 296, and *State Bank vs. Ruthe*, 90 Wash. 636, as overruling the Denny Hotel case, and shows that they do not overrule the Denny Hotel case.

The Court then quotes from the Pennsylvania cases, italicising words which we believe express the rule:

"But it is said, that there is a distinction between materials delivered *at or near* the building, or at a distance from it; but I cannot see it, provided the delivery *at a distance* was in the *usual course of business*, as it was in this case. It is customary to prepare part of the carpenter's work at the shop; why then should the boards be thrown down first at the building, in order to be taken up again and carried to the shop? The delivery at one place or another, is no further important, than that it furnishes evidence of the purpose for which the materials were sold."

And in quoting from the case of *Berger vs. Turnblad*, 107 N. W. 543, the Court says:

"The case of *Howes vs. Reliance Wire Works Co., supra*, (46 Minn. 44, 48 N. W. 448), however, establishes an exception to this rule, which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. The exception ought not to be extended to cases not fairly within the principle upon which it rests, otherwise the door will be opened for fraud or collusion between the contractor and the mechanic or materialman."

We believe the Holly-Mason case but emphasises the true rule to be that in order that the claimant may have a lien where material required

for the erection of a building is *sold and delivered* to the shop of a contractor (or subcontractor) with the consent of the owner. "*The material is deemed to have been furnished on the premises.*" In such case the materialman surrenders the possession of the material and ordinarily loses title thereto, he therefore does "furnish" material "for use in the construction" of the building and since the contractor and subcontractor are made the *agents of the owner* by the express terms of our lien statute the possession of the material thereby constructively is in the owner, and he has the legal title thereto.

When, however, the facts are such that the delivery of the materials to the contractor or subcontractor cannot be said to give the owner constructive possession thereof or to pass title to him and are not such that the material can be "*deemed to have been furnished on the premises,*" the lien fails. In that case it is said:

"The further contention is that the evidence was insufficient to justify the judgment; the more precise objection being that it was neither shown that the materials sold the contractor upon which the claim is founded, were actually used in the construction of the building, nor delivered on the ground for use therein. The testimony as to the delivery of the materials was in substance this: The place of business of the respondent was in the city of Spokane, some distance from the place where

the buildings were being constructed. The goods were ordered by the contractor in varying quantities and at different times during the progress of the work. As the orders were received, the respondent delivered the materials ordered to a common carrier, sometimes a railroad company and sometiemes an express company, for transportation to the shipping station nearest the site of the building, some two and one-half miles therefrom, from which place they were receipted for to the carrier by the contractor or someone in its behalf. The actual receivers of the goods were usually draymen or their employees, and the respondent was unable to show that more than a small quantity of them actually reached the building. The question, therefore, is whether this is such a delivery as will charge the bondsman of the contractor." * * *

"It will be observed that the statute does not in terms make use in the building a necessary prerequisite to a right of recovery on the bond for materials furnished, nor does it make delivery on the ground such a necessary prerequisite. This court has held, however, in constructing a statute with similar provisions of which the present statute is but amendatory, that one or the other of such conditions must be shown before a recovery can be had. In *Gate City Lumber Company vs. Montesano*, 60 Wash. 586, 111 Pac. 799, this language was used:

" 'The question then arises, who is a material-

man, and what is a just debt incurred in the performance of contract work, within the meaning of the act of 1909. In the case of *Fuller & Co. vs. Ryan*, 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See, also *Foster vs. Dohle*, 17 Neb. 631, 24 N. W. 208; *Weir vs. Barnes*, 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term materialman, and just debts incurred in the performance of contract work, under this statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of bona fide materialmen. It appears from the testimony in this case that at least three different lumber concerns furnished material to be used in this roadway, and if a materialman brings himself within the terms of the statute by simply loading lumber on the cars at a distant point and billing it to the contractor without more, it can readily be seen that the contractor can mulct the city, or the sureties in case a bond is given, for the value of material many times in excess of the requirements of his contract.'

"The distinguished judge writing the opinion quoted, in support of the conclusion reached, the following from the case of *Foster vs. Dohle*, 17 Neb. 631, 24 N. W. 208:

" 'But it will not be seriously contended that the mere fact that the owner enters into a contract with a builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefor. If all this material was delivered by the materialmen at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable. But that question is not before the court. The contractor, however, unless expressly constituted such, is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein. As there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same.'

"The principle of this case seems to us now eminently just. The bondsman manifestly did not become surety for all the materials the contractor might purchase during the time he is actually at work upon the contract, regardless of the use made of the materials. But since he may not be able to show that the materials furnished actually went

into the structure, he is allowed the more liberal rule of showing that he delivered the material on the ground for use therein. This rule, as was said in the case cited, is sufficient for the protection of bona fide materialmen, while a more liberal rule might lead to the grossest of frauds.

"The principle announced will bar a recovery in the present case, save for such material as was actually delivered at the building. While it is clear from the evidence that some part of it was so delivered, we have found it difficult to segregate the proportion delivered from the remainder of the claim. The necessity for making such a segregation did not arise in the court below, owing to the view the trial court took of the governing principles of law, and this accounts, perhaps, for the obscurity of the evidence in this respect.

"We have concluded, therefore, to direct a reversal and a remand of the cause(with instructions to ascertain what proportion of the materials sold the contractor were actually used in the construction of the building or were actually delivered on the ground for use therein. Either party at the hearing will have the privilege of introducing further evidence."

A consideration of these cases therefore leads to the conclusion that the Washington Court has gone only to the extent of holding that there may be constructive delivery to the premises and that

when material is *sold and delivered* to the shop of a contractor or sub-contractor, for the purpose of there working it into condition to be placed in the building, with the knowledge, consent and approval of the owner or contractor, there is a constructive delivery to the building site, but there must be a *sale and either an actual or constructive delivery* to the building site.

Since the construction put upon the lien statute by the Washington Supreme Court is the construction which will be adopted by this Court, a citation of authorities from other jurisdictions would seem to be beside the point, in view of the fact that our Supreme Court has emphatically stated time and time again that there must be at least a delivery at the building site. We will quote briefly from a few of these decisions:

In *Fuller & Company vs. Ryan*, 87 Pac. 485, the Court says:

"It was urged by appellant that the principal error of the trial court was its holding to the effect that a materialman's lien could not be established where it did not appear that the materials were actually used in constructing the building, or delivered on the premises for such use. Appellant, through its counsel, expressed itself as willing to base its rights to a reversal of the decree on this proposition. We think the holding of the trial court upon this question must be upheld." * * *

"If the materials were not used in the building, nor taken to the premises, we do not think it could be said that they were purchased to be used in such building, within the meaning of the statute. The reason for allowing a lien to secure the purchase price of building material would seem to be absent where such material was neither used in the building nor taken to the premises for the purpose; and it would be difficult to see why the vendor of such material would have any better right to a lien than would the seller of any other species of personal property. Doubtless, the actuating thought of the legislature was that the materialman should retain a purchase-price lien upon the thing itself; and this could be accomplished only by allowing a lien upon the building and the premises into which, or upon which, said material should become builded or delivered. To hold the right of lien further extended could only be done under a statute clearly evidencing such an intention on the part of the legislature. We deem our statute incapable of such a construction. (Citing Cases.)

In *Crane Company vs. Fernandis*, 90 Pac. 1134, the Court says:

"We are unable to find any competent testimony tending to show that the material was furnished for use in the building or was so used * * * there must be some testimony tending to show the furnishing and the use of the material for which the lien is claimed."

In *Tsutakawa vs. Kumamoto*, 101 Pac. 869, the Court says:

"The object of this statute is to secure a lien to the labor and materialman for that which goes into the finished structure."

In *Gate City Lumber Co. vs. Montesano*, 111 Pac. 799, the Court says:

"In the case of *Fuller & Co. vs. Ryan*, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein, (citing cases). We are not disposed to place a broader construction upon the term *materialman*, and *just debts incurred in the performance of the contract work*, under the statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of bona fide materialmen."

Unless it was the intention of our Supreme Court to overrule all of these cases in the Western Hardware case, this is still the law of Washington. We believe that no one will even contend that the Supreme Court had any such intention, and that this court must conclude that the only thing decided in that case was that when the circumstances warrant it, a delivery of material to a place other than at the building site may be "deemed to have been furnished on the premises".

In none of the cases presented by these appeals were the circumstances such that the "materials could be deemed to have been furnished on the premises" because they were not furnished to anyone at any place, but on the contrary the title to them and the possession of them have always remained in the contractors.

A reading of the cases from other jurisdictions has convinced us that there is probably a distinction underlying many apparently conflicting decisions of the courts, in this: if a laborer performs labor on articles for use in a building at a point distant from the building which place can be fairly and reasonably construed to be the place agreed upon for the doing of the work that constructively the work is done upon the building and the lien is upheld. This would seem to be entirely reasonable and just. Where, however, a materialman still has his material in his possession, it would be unreasonable to allow him a lien for the material, although it might be entirely reasonable under the same circumstances to allow his laborers to claim a lien for their work thereon. In such case, both the laborer and the owner can be protected. If the laborer should compel the owner to pay him by the foreclosure of his lien, the owner thereby becomes subrogated to the laborer's rights as against the material and can force the materialman to either repay the money or can foreclose on the materials themselves. That was substantially the situation in

the case of *Berger vs. Turnblad*, 107 N. W. 534, cited with approval by the Washington Supreme Court in the Western Hardware & Metal Company case.

This idea is very forcibly illustrated by the case of *Trammel vs. Mount*, 4. S. W. 377, referred to in appellant's brief. In that case a materialman had agreed to build a stone wall for a house. He cut and actually used in building that portion of the wall which was built of certain stones, and at the time the work was stopped he had certain other stone cut at his shop. The question involved in the case was whether or not he was entitled to a lien *for his labor* on the stone which was cut at his shop. It will be noted that he did not claim a lien for this material, but only for his labor in preparing it. In that case the court says that it approves the so-called Pennsylvania rule and reasons, as follows: "We have heretofore held that a delivery to the owner no matter at what distance from the building, transfers the title to the material * * *. It gives the owner of the building complete ownership and control over it and it would be unjust to place it in the power of the person to whom it was delivered or furnished to defeat a lien upon his property through his own wrong in appropriating it to other purposes than those for which it had been furnished."

Again in the case of *Burns vs. Sewell*, 44 N. W. 234, cited by appellant, the court said: "the

furnishing of material is complete *when it is sold and delivered* for the purpose of the erection."

Again 2 Jones, 3rd Sec. 1329, referred to by the appellant in its brief says: "as soon as the materials are furnished they become the property of the owner and subject to the lien; and they are not liable to be taken for the debts of the contractor or materialman who furnished them.

Again in *Thompson-McDonald Lbr. Co. vs. Morawitz*, 149 N. W. 300, the court says: "in many instances material for the construction of buildings is shipped to the contractor at some distant point. A delivery to the carrier in such a case, *the material being consigned to the contractor*, is a delivery to the contractor * * *"

Again in the case of *Great Western Mfg. Co. vs. Hunter*, 16 N. W., 759, cited by appellant, the Court says: "If the contract and delivery, or furnishing under it, *is sufficient to create an indebtedness or liability*, it is sufficient to create a lien."

In *King vs. Cleveland Ship Co.*, 34 N. E. 436, cited by appellant, the Court says, with reference to a contract which required the materialman to furnish an engine "f.o.b cars Cleveland": "when that was done the contract was fully performed on the part of the furnace company and defendant in error. The title to the engine at once vested in the purchasing company, which then became bound for the payment of the whole purchase price as stipu-

lated in the contract * * * when the delivery on the cars was complete the engine was furnished in compliance with the contract, and within the meaning of the statute."

We believe that from these quotations that it will at once become apparent that no court has intended to lay down the law that a materialman who has never parted with either the title or possession of the material is entitled to a lien.

Certainly the appellant in this case made no delivery. It specifically and in writing refused to even ship its terra cotta to Tacoma "until we get payment for same or until you are ready to receive it at the building we will not ship—until either one of these propositions are completed." (Tr. p. 813.) And when it received notice that the bank had failed it unloaded the terra cotta which it had on cars ready for shipment to Tacoma and after the institution of this action when the Receiver demanded of it that it either deliver the terra cotta and rely on its lien, it refused to answer the letter.

We realize that when a person makes a contract and in good faith expends his money in preparing to fulfill the terms thereof and the contract is breached, a hard case arises. But that is the risk that is incident to practically every contract and there is no reason in giving the contractor other and different remedies than those given to

every one who has contracted to sell personal property when the buyer breaches the contract before the goods are delivered. This is the case with the appellant. It contracted to sell and deliver personal property but before there was any delivery the contract was breached. That does not make it a materialman within the meaning of the lien statute which was designed to protect an unpaid vendor and not to furnish a different relief for damages for breach of contract.

Respectfully submitted,

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